International Litigation

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I. Parallel Proceedings and the Guiding Hand of Comity

> [A] rule which permitted parallel proceedings would avoid a "race to file" but in its place would be an equally troubling "race to judgment." If neither action is stayed, the advantage goes to the first party to obtain judgment in its favour because the other jurisdiction would be expected to respect that judgment. Permitting parallel proceedings to continue would encourage a litigation strategy in which each side would attempt to expedite its own action while prolonging in any way possible the other party's action through endless motions or other delaying tactics. In other words, allowing parallel proceedings to continue would not avoid entirely the problem of a "race to the courthouse" but would simply push the problem back a stage in the proceedings.[1]

Parallel proceedings involving international litigation raise the potential for unrestrained and vexatious litigation in multiple countries. They result in a race at one end of the litigation or the other—to file or to judgment. There are three possible responses to parallel proceedings: (1) stay or dismiss the domestic action, (2) enjoin the parties from proceeding in the foreign forum (referred to as an antisuit injunction), or (3) allow both suits to proceed simultaneously. This year's decisions involving concurrent litigation again reflect an increasing awareness of the role of comity and a willingness to defer to foreign proceedings,

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1. Westec Aerospace Inc. v. Raytheon Aircraft Co., 173 D.L.R. 4th 498, 511 (B.C. Ct. App. 1999).

especially when filed prior to the domestic litigation. Many of the cases concerning parallel proceedings this past year pitted one common-law jurisdiction against another, providing an interesting comparison of the responses here and abroad. These cases also reflect the common concerns with fairness to the parties and waste of judicial resources. While comity gained ground, antisuit injunctions continued to be issued. But the year offered promise for the future with the real possibility of a multilateral judgments convention that would reduce the need for parallel proceedings and the race to the courthouse.

A. Comity Firmly Established

As has been the trend recently, comity continued to provide the basis for staying[2] U.S. litigation in deference to foreign litigation, especially when the foreign suit was filed first. The Eleventh Circuit, the court that recognized "international abstention" as an independent doctrine five years ago in *Turner Entertainment Co. v. Degeto Film GmbH*,[3] maintained its affinity for discretionary abstention by courts faced with concurrent international jurisdiction, even in light of the Supreme Court's intervening decision in *Quackenbush v. Allstate Insurance Co.*[4] In that case, the Supreme Court surveyed the domestic abstention doctrines and held that federal courts had the power to dismiss or remand only in equitable relief cases. The Eleventh Circuit specifically addressed the applicability of *Quackenbush* to international abstention as a matter of first impression "in this, as well as any other, circuit" in *Posner v. Essex Insurance Co.*[5] In *Posner*, a Florida individual and majority shareholder of SMC, a privately held Maryland corporation, sued Essex, a Bermuda insurer that was owned thirty-five percent by SMC and sixty-five percent by Salem, a Pennsylvania corporation of which Posner owned forty-nine percent. The suits alleged a variety of claims, including financial mismanagement and breach of contract, in connection with failure to pay claims on insurance policies. Essex, after denying the claims, filed a declaratory judgment action in Bermuda on the validity of the insurance policies. The district court dismissed all claims on grounds of personal jurisdiction or international abstention.

In reviewing the portion of the lower court's action dismissing in favor of the parallel Bermuda litigation, the Eleventh Circuit addressed the plaintiff's argument that *Quacken-*

2. As discussed in more detail in the text, federal courts, especially the district courts, appear to have hastily seized upon the language in *Quackenbush v. Allstate Insur. Co.*, 517 U.S. 706 (1996), about the ability of a federal court to dismiss only in cases of equitable relief, and therefore these courts have emphasized the need to "stay" as opposed to "dismiss" the pending U.S. litigation.

For an interesting discussion of the issue of applying *Quackenbush* in the international context and the need for a stay rather than a dismissal, see 767 *Third Avenue Associates v. Socialist Federal Republic of Yugoslavia*, 60 F. Supp. 2d 267, 278–82 (S.D.N.Y. 1999), in which the district court stayed litigation involving a dispute over rented diplomatic offices in connection with the disintegration of Socialist Federal Republic of Yugoslavia as a nonjusticiable political question. The court stated that

> [T]he deference that is necessary here is deference to an executive branch foreign policy determination, which itself is a policy of deference to ongoing international efforts. The principles underlying the choice of a stay over a dismissal apply equally when the deference motivating abstention bases not on constitutional federalism and federal-state comity, but instead, as here, on constitutional separation of powers and national-international comity.

Id. at 282.

3. Turner Entertainment Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994).

4. *Quackenbush*, 517 U.S. 706.

5. Posner v. Essex Insur. Co., 178 F.3d 1209, 1222–24 (11th Cir. 1999).

bush removes the discretion of the district court to abstain in a nonequitable claim, the sort at issue here. "Read in the proper context . . . the Supreme Court's admonition that courts generally must exercise their nondiscretionary authority in cases over which Congress has granted them jurisdiction can apply only to those abstention doctrines addressing the unique concerns of federalism."[6] Finding that *Quackenbush* does not control in the realm of international litigation and that *Turner* is the controlling precedent, the Eleventh Circuit then applied the three *Turner* factors: " '(1) a proper level of respect for the acts of our fellow sovereign nations—a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.' "[7] The court reviewed the basis for abstention, finding that the Bermuda forum was competent and that it was fair to allow the earlier-filed Bermuda action to proceed, but modified the dismissal to a stay. "The district court correctly concluded, therefore, that '[s]carce judicial resources . . . would be used most efficiently if the Bermuda action were to proceed to conclusion before this Court entertained Posner's insurance policy-related claims.' "[8] The Eleventh Circuit, although abstaining in favor of parallel foreign litigation, correctly acknowledges that domestic abstention doctrines are inapplicable to relationships "between federal courts and foreign nations (grounded in the historical notion of comity)."[9]

In *Goldhammer v. Dunkin' Donuts, Inc.*,[10] another case involving proceedings in two common-law forums,[11] a district court in the First Circuit also considered the applicability of *Quackenbush* when faced with a motion to dismiss the U.S. lawsuit in favor of an earlier-filed English suit. After discussing the Eleventh Circuit's opinion in *Posner*, and deciding that "*Quackenbush* does not crisply govern in the area of international abstention,"[12] the court determined that the question was academic since, as a practical matter, in many circumstances a stay is "tantamount to dismissal."[13] The litigation involved a licensing and franchise agreement between Dunkin' Donuts and DD UK, Ltd., an English corporation, owned largely by a Florida resident, Robert Goldhammer. Dunkin' Donuts filed the first suit in England, seeking royalties and damages.[14] DD UK answered and counterclaimed for damages for breach of the licensing agreement. Four months later, and almost one year after Dunkin' Donuts originally filed in the United Kingdom, DD UK filed a reverse-image action in the federal district court in Massachusetts, adding several bases, including fraud, deceit, and violation of a Massachusetts state deceptive trade practices statute. Dunkin' Donuts then moved to dismiss or stay the second-filed suit in Massachusetts, based on international abstention. The district court put together a "roster of relevant factors" for ruling on the motion, taken from earlier cases in several courts,[15] including (1) similarity

6. *Id.* at 1223.

7. *Id.* at 1223–24 (citing *Turner*, 25 F.3d at 1518.)

8. *Id.* at 1224.

9. *Id.* at 1223.

10. Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248 (D. Mass. 1999).

11. In both concurrent litigation cases and forum non conveniens cases, the significance of a common legal tradition receives some weight, even when unstated. "Because the United States and England share the same common law heritage, deference to British proceedings is consistent with notions of international comity." *Id.* at 255.

12. *Id.* at 252.

13. *Id.*

14. About two months later, Dunkin' Donuts filed a second suit in England, which was then consolidated with the first.

15. Many of the factors appear in *Caspian Investments, Ltd. v. Viacom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991). The facts and analysis are also similar to *Dragon Capital Partners L.P. v. Merrill Lynch Capital*

of parties and issues (here minimal differences); (2) promotion of judicial efficiency ("not dispositive," but "key factor"); (3) adequacy of relief in the alternative forum (DD UK claims that it will lose its Massachusetts unfair and deceptive trade practices claim); (4) fairness and convenience of the parties, counsel, and witnesses (equal here); (5) possibility of prejudice (consideration of different procedures available); and (6) temporal sequence of filing (heavy factor here).[16]

The court's analysis in *Goldhammer* is interesting in three respects. First, the court appears to rely on the use of a stay rather than a dismissal, which action it assumes is commanded by *Quackenbush*, as a substantive solution to arguments about the potential loss of the Massachusetts statutory deceptive trade practices claim and the differences in procedural systems. Second, the court's approach incorporates significant aspects of a forum non conveniens analysis, specifically reducing the "fairness" factor to convenience of the parties, counsel, and witnesses and analyzing procedural differences in discovery[17] available in the United States, as opposed to what amounts to the "alternative forum" of England.[18] Finally, the importance of comity, especially when there is a shared "common law heritage," is stressed at several points. "[N]otions of international comity are at an apex when parties inject themselves into the economy of another nation for profit, particularly one as close as Great Britain, and then try to extricate themselves from its jurisdiction."[19]

In *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*,[20] another case involving multiple proceedings in the United States and England, the federal court for the Southern District of New York applied similar factors, taken also in part from *Caspian Investments, Ltd. v. Viacom Holdings, Ltd.*,[21] to dismiss the U.S. action in deference to the pending prior proceedings in London. Indeed, the analysis looks more like one for determining the most appropriate forum, akin to the approach used by English[22] and Canadian courts, as discussed below. The court in *MLC* actually added a factor not usually seen in analysis of whether to stay or dismiss in deference to parallel litigation, that of the plaintiff's choice of forum, which the court here said "is entitled to much less weight when it is made after the filing of a concurrent action arising out of the same series of transactions."[23] The consideration of plaintiff's choice of forum is generally reserved for forum non conveniens and personal jurisdiction analysis. The court also seems to suggest that whenever there are two suits,

Services., Inc., 949 F. Supp. 1123 (S.D.N.Y. 1997), a case discussed in the 1997 Year in Review. *See* Louise Ellen Teitz, *International Litigation*, 32 INT'L LAW. 223 (1998) [hereinafter *International Litigation*].

16. *See International Litigation, supra* note 15, at 253–56.

17. In response to DD UK's concerns that it cannot take pre-trial depositions in England, the court comments on the new procedural rules in England, as yet untried: "[A]s the federal courts grapple with controlling discovery costs and English courts look to expand discovery rights, soon the key difference between the two systems might be the wigs." *Goldhammer*, 59 F. Supp. 2d at 255 n. 1.

18. One often finds motions for dismissal for forum non conveniens joined with alternative motions to stay. *See generally* Louise Ellen Teitz, TRANSNATIONAL LITIGATION 236–42 (1996 and 1999 Supp.) [hereinafter TRANSNATIONAL LITIGATION]. *See, e.g., Dragon Capital Partners*, 949 F. Supp. 1123.

19. *Goldhammer*, 59 F. Supp. 2d at 255–56.

20. MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp., 46 F. Supp. 2d 249 (S.D.N.Y. 1999).

21. *Caspian Inv.*, 770 F. Supp. at 884.

22. For an interesting comparison, one can look at the English proceeding involving a portion of this litigation in the Commercial Court in London, in which the court issued a limited antisuit injunction as to certain claims, which were then eliminated from the U.S. complaint. *See* Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd, [1999] 1 Lloyd's Rep. 767 (Q.B. 1998).

23. *MLC (Bermuda)*, 46 F. Supp. 2d at 254.

only one should proceed—the other court should, it is assumed, defer. "[D]ismissal will likewise promote judicial economy. Where a single court is capable of fairly and competently adjudicating an entire controversy, there is little reason to divide the task between two courts."[24]

Thus, more and more courts, when faced with parallel proceedings, are staying or dismissing the U.S. action, especially if it is the later-filed suit, viewing this as an appropriate response to concurrent jurisdiction and one dictated by both judicial efficiency and a growing awareness of "comity."

B. Antisuit Injunctions in 1999

Antisuit injunctions, the reverse image of staying or dismissing, accord no deference to foreign sovereigns.[25] During 1999, the case law remained stable,[26] with the Ninth Circuit reaffirming its place among those circuits embracing the liberal approach to granting an antisuit injunction, followed primarily by the Fifth, Seventh, and Ninth Circuits, as opposed to the stricter "Laker"[27] standard followed primarily by the D.C., Second, and Sixth Circuits.[28] Indeed, the Ninth Circuit's earlier 1981 opinion in *Seattle Totems Hockey Club, Inc. v. National Hockey League*[29] is generally cited, along with the Fifth Circuit's 1970–71 opinion in *In re Unterweser Reederei, GmbH*,[30] as the seminal case for allowing antisuit injunctions based on duplicative litigation, according less weight to comity and more to whether the litigation is vexatious or would result in wasted judicial resources. The Ninth Circuit's unpublished opinion in *Communications Telesystems Int'l. v. Mercury Communications Ltd.*[31] affirms the lower court's injunction against Mercury's parallel suit in England. Although the facts are not provided in the brief opinion,[32] it appears that Communications Telesystems International (CTS) sued Mercury for breach of contract in a California state court.

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24. *Id.*

25. For an interesting analysis of parallel proceedings, circuit by circuit, see Margarita Trevino de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. Int'l L.J. 79 (1999). *See generally* Teitz, Transnational Litigation, *supra* note 18, at 233–50.

26. For a discussion of the two approaches to antisuit injunctions and recent case law, see Louise Ellen Teitz, *International Litigation*, 33 Int'l Law. 403 (1999); *International Litigation*, *supra* note 15; Louise Ellen Teitz, *International Litigation*, 31 Int'l Law. 317 (1997).

27. Laker Airways, Ltd. v. Sabena, Belgium World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

28. For a review of the basic antisuit case law, see *PTY LTD v. Norfolk Southern RR Co.*, 71 F. Supp. 2d 1363 (N.D. Ga. 1999), in which a district court in the Eleventh Circuit in 1999 considered the major precedent in all circuits to determine what standard to apply in ruling on an antisuit injunction motion in connection with litigation in the United States and Australia. The court, indicating that the Eleventh Circuit has not addressed the issue, adopts the stricter standard. It is odd that the court fails to mention or discuss the Eleventh Circuit's significant opinion in *Turner Entertainment Co.*, which advocates international abstention and extols the importance of comity. The *Turner* court's approach is consistent with the view that a court should be reluctant to interfere so directly with a foreign sovereign as by enjoining parties from proceeding in the foreign forum.

29. Seattle Totems Hockey Club, Inc. v. National Hockey League, 652 F.2d 852, 855–56 (9th Cir. 1981), *cert. denied sub nom.* Northwest Sports Enterprises, Ltd. v. Seattle Totems Hockey Club, Inc., 457 U.S. 1105 (1982).

30. *In re* Unterweser Reederei, GmbH, 428 F.2d 888 (5th Cir. 1970), *aff'd en banc*, 446 F.2d 907 (1971), *rev'd on other grounds sub nom.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

31. Communications Telesystems Int'l v. Mercury Communications Ltd., 202 F.3d 277 (9th Cir. 1999).

32. The facts are as detailed in 3 Telecommunications Ind. Litigation Rep. 8 (Andrews Publications, Inc. December 1999).

The case was subsequently removed to federal court. Mercury filed what appears to be a reverse-image suit two months later in England. CTS first tried unsuccessfully to dismiss the English action on the basis of forum non conveniens. Then Mercury tried the same ploy in California, moving to dismiss in favor of the London forum. Next, CTS moved for an antisuit injunction to stop Mercury from proceeding in London. The district court, relying on the *Seattle Totems* case, granted the injunction, finding that Mercury's foreign suit was really a compulsory counterclaim to the U.S. suit. Hence, allowing Mercury to litigate in London would undermine the federal rules governing counterclaims[33] and could result in substantial inconvenience to the parties and potentially inconsistent rulings. Mercury's pleas for comity fell on deaf ears in spite of the English court's prior ruling that the parties had contractually agreed to an English nonexclusive choice of forum. It is interesting to compare this determination with the earlier English ruling on CTS's attempt to have that action dismissed based on forum non conveniens. The English court focuses on the agreement to submit to jurisdiction in England and the implicit recognition that England would be an appropriate forum for litigation.

> If CTS is to obtain a stay of these proceedings, therefore, it can only be on the grounds that there are concurrent proceedings in California in which the same issues will be litigated. . . . However, there would be more force in the argument if CTS had not expressly agreed to submit to the jurisdiction of the courts of this country. . . . [I]t is the defendant, in this case CTS, who has brought upon itself the risk of two sets of proceedings since it must have been aware when it started its own action that Mercury might well bring proceedings here to recover the amounts which it alleged still to be outstanding. If the court were generally to stay proceedings here simply on the grounds that the defendant had already commenced proceedings in another jurisdiction, it would effectively deny the plaintiff the benefit of the defendant's submission to the jurisdiction and encourage other parties who have had second thoughts about their contracts to rush to begin proceedings in another forum.[34]

Multiple proceedings in England and the United States involving alleged antitrust violations by barge owners sparked a controversy reminiscent of the earlier antisuit battles in the *Laker* antitrust litigation.[35] In *Shell Offshore, Inc. v. Heeremac*,[36] a group of oil companies filed suit in federal court in Houston against barge owners for alleged allocation of the market. One group of defendants, added after the initial complaint who were apparently contesting jurisdiction, filed suit shortly thereafter in England, seeking to enforce the London forum selection clause by enjoining the plaintiff-U.S. oil companies from continuing the antitrust claims in Houston. The oil companies applied to the federal court for a temporary injunction to stop the barge companies from continuing the London action. The district court, apparently miffed at the fact that the foreign barge owner defendants had not sought to "abate" the Houston action, nonetheless refused to issue the injunction. In doing so, it applied traditional injunctive relief standards, finding no immediate or irrepa-

33. *See* FED. R. CIV. P. 13.

34. *Mercury Communications Ltd v. Communications Telesystems Int'l*, (Transcript) (Q.B. Comm. Ct. May 27, 1999).

35. *Laker Airways, Ltd*, 731 F.2d 909; *see also* British Airways Bd. v. Laker Airways, 3 W.L.R. 413; Aryeth S. Friedman, *Laker Airways: The Dilemma of Concurrent Jurisdiction and Conflicting National Policies*, 11 BROOKLYN J. INT'L L. 181 (1985).

36. Shell Offshore, Inc. v. Heeremac, 33 F. Supp. 2d 1111 (S.D. Tex. 1999). The defendant's name appears to be a typographical error since the Swiss company involved is Heerema.

rable injury to the oil companies at this time from the continuation of the English action. It characterized the London suit as a declaratory judgment action on the issue of venue that raised a dilatory plea and not an independent action and that should have been brought in Houston. "While the distinct action in London is adjudged to be an unjustified, disingenuous complicating maneuver, an injunction is not needed now. If . . . [the barge owner] persists in London and if the Queen's Bench does not stay its case, then Shell's remedy for Saipem's useless play can be reexamined."[37] The court's parochial view of forum selection clauses is equally evident from its characterization of the dispute under the heading "Comity":

> The London action implicates no interest of England as a nation. It is a dispute between multinational companies about their claims under an American statutory scheme. . . . An Italian conglomerate is not a surrogate for the British Crown. . . . Nothing in this suit puts England and America at odds as sovereigns in the community of nations, and nothing puts the United States District Court . . . at cross purposes with the Queen's Bench; this is a problem of judicial economy and procedural efficiency rather than an occasion for deference between nations.[38]

The district court gives no weight to the English court's attitude toward forum selection clauses, treating it as merely in accord with U.S. views of venue. The court also fails to acknowledge the underlying problem of concurrent jurisdiction and extraterritorial application of law, here not against an English company specifically but in breach of an English forum selection clause. The ghost of *Laker* still walks.

C. Learning from Our Neighbors in the North

Recent Canadian case law explicitly ties the treatment of parallel proceedings to forum non conveniens analysis, incorporating consideration of the appropriateness of the forums where the litigation is pending[39] and emphasizing the importance of comity in any parallel proceedings. *Westec Aerospace, Inc. v. Raytheon Aircraft Co.*[40] is a simple contract dispute concerning computer software and hardware, in which the parties apparently provided for choice of law but not choice of forum. While a settlement offer by Westec was pending, Raytheon filed suit in a Kansas federal court seeking declaratory relief.[41] Two months later, Westec filed an action in British Columbia for damages against Raytheon for failing to return certain source codes and products upon termination by Westec of Raytheon's license. Raytheon moved to set aside the service of the writ and then appealed the denial of that order. The Court of Appeals ultimately reversed the lower court and stayed the action in British Columbia, finding that forum non conveniens was the "guiding principle" to be used when a stay was sought and both forums were appropriate for the litigation. Comity would be offended by allowing the later-filed action to proceed.

The court's analysis began by reviewing the Canadian case law concerning parallel proceedings and the major case in the area, *Amchem Products, Inc. v. British Columbia* in which

37. *Id.* at 1113.

38. *Id.*

39. Amchem Products, Inc. v. British Columbia, 102 D.L.R. 4th 96.

40. Westec Aerospace, Inc. v. Raytheon Aircraft Co., 173 D.L.R. 4th 498 (B.C. Ct. App. 1999).

41. Westec attempted to argue to the court the public policy argument that Raytheon should not be allowed to file a lawsuit while a settlement offer was outstanding, as this was contrary to the policy of encouraging settlement. The court rejected this argument, suggesting that settlement negotiations often continue while litigation is ongoing.

the Supreme Court of Canada "held that forum non conveniens is now the applicable rule in Canada when the court is asked to decline jurisdiction or set aside service ex juris."[42] After discussing the differences between Canadian and English case law, the court then proceeded with the analysis for parallel proceedings:

(1) Are there parallel proceedings underway in another jurisdiction?
(2) If so, is the other jurisdiction an appropriate forum for the resolution of the dispute?
(3) Assuming there are parallel proceedings in another appropriate forum, has the plaintiff established objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the British Columbia action that is of such importance that it would cause injustice to him to deprive him of it?[43]

The court first found that the two actions are basically the same and that both forums are appropriate in that they have connections to the litigation.[44]

Since Kansas is an appropriate forum, the next question is whether Westec is losing some juridical advantage to which it is entitled. The court then considered the two alleged advantages: (1) avoiding a jury trial "in an action brought by a large American defense contractor in its home town"[45] and (2) the summary proceedings available under British Columbia law. While the lower court had accepted these arguments, the Court of Appeals rejected them, especially in light of having to face a local Kansas jury.

> [I]t is difficult . . . to reconcile . . . with the concept of comity which is the animating principle of contemporary Canadian jurisprudence in this area. . . . In this case, Westec has confined its argument to what Lord Diplock [in the premier English case, Albin Daver] reproachfully termed, "tenuous innuendoes" about the quality of justice in the foreign jurisdiction it wishes to avoid. Westec's argument on this point depends on the unstated and unsavoury assumptions about the quality of American justice. Those assumptions should not be accepted without cogent proof that Westec could not get fair treatment under the Kansas justice system. . . . The other juridical advantage identified . . . was the availability in this Province of summary trial proceedings. If this factor were considered cogent evidence of an important juridical advantage, a litigant would be free to commence parallel proceedings in this Province whenever it had been sued in a jurisdiction which lacks the equivalent summary trial procedure. . . . Such a ruling could have sweeping consequences and offends the principle of comity by refusing to acknowledge the efficacy of proceedings brought in jurisdictions which do not mirror exactly the procedural rules of this Province.[46]

In the end, Westec suffered a default judgment in Kansas,[47] obviously deciding that American procedure and juries were to be avoided. Yet, courts in the United States could learn

42. *Amchem*, 102 D.L.R. 4th 96.
43. *Westec*, 173 D.L.R. at 507.
44. "Once it is shown that Kansas has a real and substantial connection to the dispute, then it cannot be said that the parties did not have a reasonable expectation that the action could be tried there. This is true even if . . . the action also has a real and substantial connection to British Columbia. . . . Taking into account the various factors . . . as well as the fact that the product which was the subject of the contract was used in Kansas, I am of the view that Kansas has a close connection with the subject matter of the action and may be regarded as an appropriate forum for the resolution of the dispute between the parties. In other words, the parallel proceedings are in another appropriate forum." *Id.* at 512–13.
45. *Id.*
46. *Id.* at 513–14.
47. Raytheon Aircraft Co. v. Westec Aerospace, Inc., 1999 U.S. Dist. LEXIS 18760 (D. Kan. 1999).

from the approach of our northern neighbors, which explicitly assumes that only one lawsuit should proceed unless there is some prejudice to the parties or unless the parallel suit is not in an appropriate forum. Although the rule relies on a race to the courthouse, as opposed to a race to judgment, the alternative race to judgment is no better. And underlying the entire analysis is a deep respect for foreign procedures and legal systems, a sense of "comity" in the broad sense—quite the opposite of that utilized by many U.S. courts in granting antisuit injunctions.

D. The Promise of the New Millennium

One of the motivating forces for multiple proceedings here and abroad has been the lack of a multilateral convention on the enforcement of judgments to which the United States is a party.[48] The negotiation of a multilateral judgments convention that includes both jurisdiction and enforcement of judgments is currently proceeding under the auspices of the Hague Conference on Private International Law, with a proposed late 2000 date for opening for signature. The scope of the convention is limited to civil and commercial matters, and specifically excludes among other categories, administrative matters, admiralty matters, and most family law matters, such as maintenance obligations and matrimonial property. The current draft as of October 30, 1999, restricts some personal jurisdiction concepts available in the United States. The proposed draft includes a modified lis pendens for courts other than the first seised (article 21), which is tied to the possibility of a form of forum non conveniens under article 22, which allows a court to decline jurisdiction, even if first seised.[49] Although chronologically the last concern in litigation, enforcement and recognition of judgments is one of the prime motivators for filing a lawsuit—or two lawsuits. Thus, a judgments convention that ties potential enforcement to a lis pendens provision would go a long way in reducing the amount of concurrent litigation and the attendant costs to parties and judicial systems, as well as the frictions often generated by multiple proceedings.

II. Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act

The Foreign Sovereign Immunities Act (FSIA)[50] is the sole basis for obtaining jurisdiction over a foreign state and its agencies and instrumentalities in a U.S.

48. The EU and EFTA countries have the Brussels and Lugano Conventions. The Brussels Convention is in the process of being amended through enactment by the EU of a "Brussels Regulation" instead of the Convention. A draft of the regulation was published last year. Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (1999) 348 final, submitted by the Commission on September 7, 1999, *available in* the Official Journal of the European Communities C 376 E of 28.12.1999, page 1 *et seq.* The Proposal is also available on the Internet at: Eur-Lex, Community Preparatory Acts (visited June 12, 2000) <http://europa.eu.int/eur->lex/en/com/dat/1999/en_599PC0348.html>. The lis pendens provisions have been renumbered as articles 27–30, but continue to provide that generally any court not first seised should decline jurisdiction. The revisions expand on the existing Convention by defining what constitutes being "seised" and clarifying what are "related actions."

49. Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Oct. 30, 1999 (last modified June 12, 2000) <http://www.hcch.net/e/conventions/draft36e.html>.

50. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11 (1994).

court.[51] Codifying the "restrictive theory" of foreign sovereign immunity, the FSIA grants to foreign states immunity from suit in U.S. courts unless an exception applies.[52] Among the issues with which the courts dealt in 1999 were implicit waiver of immunity, subject matter jurisdiction, retroactive application of the FSIA, removal under the FSIA, and the effect of tiered ownership interests.

A. Implicit Waiver of Immunity

Immunity from suit will not be available where a foreign state has waived its immunity either explicitly or implicitly.[53] Decisions in 1999 reflect the tendency of courts to interpret the implicit waiver clause narrowly. For example, the Ninth Circuit found that the failure of the defendant foreign state to raise the defense in its answer was not a waiver. In *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*,[54] the plaintiffs brought slander, conversion, trade libel, and invasion of privacy claims against a Japanese television broadcaster who had broadcast statements about the plaintiffs in both Japan and the United States.[55] The plaintiffs argued that sovereign immunity is an affirmative defense that must be raised in the answer and that the defendant's failure to do so precluded the defendant from raising the defense in a motion to dismiss.[56]

The court found that the defendant was an "organ" of the Japanese government and then addressed the argument that immunity had been waived.[57] After noting that the waiver exception had been narrowly construed, the court held that there had been no implicit waiver of the defense because Nippon had raised the defense by motion a mere three months after its answer, which had included the defense that the court lacked subject matter jurisdiction, and there was no evidence that Nippon intended to waive the defense.[58]

The U.S. Court of Appeals for the District of Columbia also interpreted the implicit waiver provision narrowly by finding no waiver where a foreign state had participated in an arbitration in a country that is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). In *Creighton Ltd. v. Government of Qatar*, an American company sued the government of Qatar to enforce an arbitration award that it had obtained in France.[59] The plaintiffs argued that the government of Qatar implicitly waived its immunity by agreeing to arbitrate in France, which is a signatory to the Convention.[60] According to the plaintiffs, Qatar was therefore on notice that an arbitration award obtained in France could be enforced in the United States, which is also a signatory to the Convention.[61]

51. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).
52. *See* 28 U.S.C. § 1604.
53. *See* 28 U.S.C. § 1605(a)(1).
54. Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078 (9th Cir. 1999).
55. *See id.* at 1082.
56. *See id.* at 1083.
57. *See id.* at 1084.
58. *Id; cf.* HSMV Corp. v. ADI Limited, 72 F. Supp. 2d 1122, 1126–27 (C.D. Cal. 1999) (company owned by foreign state waived sovereign immunity defense by agreeing to arbitrate dispute in United States and not raising defense in answer); Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 46 F. Supp. 2d 231, 234 (S.D.N.Y. 1999) (foreign state bank waived sovereign immunity defense by removing case to federal court, failing to raise defense in its answer, and moving to dismiss case on grounds of forum non conveniens).
59. Creighton Ltd. v. Government of Qatar, 181 F.3d 118 (D.C. Cir. 1999).
60. *See id.* at 121.
61. *See id.*

In holding that Qatar's participation in French arbitration did not constitute a waiver, the court emphasized that the implied waiver provision has been repeatedly held to require some evidence that the foreign state intended to waive its immunity.[62] The court expressly followed the Second Circuit in finding that this intent could not be found in a simple agreement by a foreign state that a dispute would be governed by the laws of, or arbitrated in, another country, whether or not that third country is a signatory to the Convention.[63] The court noted, however, that the result would be different if Qatar had also been a signatory because " 'when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states.' "[64] The court nevertheless went on to find that Qatar had waived its immunity under section 1605(a)(6) of the FSIA, the "arbitration exception," even though that exception had been added to the FSIA after commencement of the arbitration to which Qatar had been a party.[65]

B. Subject Matter Jurisdiction

In *Southway v. Central Bank of Nigeria*,[66] the U.S. Court of Appeals for the Tenth Circuit determined that the FSIA did not preclude a district court from exercising subject matter jurisdiction over an action against a foreign state under the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO). The defendants, Central Bank of Nigeria and Republic of Nigeria, sought to collect funds from investors for an over-invoiced contract for oil-drilling machinery in exchange for proceeds. The investment scheme turned out to be a scam with the plaintiffs, investors in Colorado, allegedly losing more than $500 million.

The defendants argued that under the FSIA foreign sovereigns are immune from criminal indictment and, therefore, the plaintiffs could not show the predicate indictable acts required for a civil RICO claim. The court found that the FSIA applies to any nonjury civil action,[67] including civil RICO claims, and does not address sovereign immunity from criminal prosecutions. The court then held that the "commercial activity" exception of the FSIA applied to give the court jurisdiction over the conduct at issue.

C. Retroactive Application of the FSIA

The FSIA codification of the restrictive theory of sovereign immunity in 1976 began in 1952 with the Department of State's issuance of the Tate Letter.[68] Prior to 1952, the United

62. *See id.* at 122.

63. *See id.* at 122–23; *see* Seetransport Wiking Trader v. Navimpex Centrala, 989 F.2d 572, 578 (2d Cir. 1993).

64. *See Creighton Ltd.*, 181 F.3d at 123.

65. *See id.* at 123–24 (stating that immunity is not granted under § 1605(a)(6) when an action is brought against a foreign state in order to enforce an arbitral agreement when the agreement is or may be governed by a treaty or some other international agreement that calls for the enforcement of the award in the United States). Since the arbitration award was granted in France, a signatory of the Convention, the award was subject to enforcement in the United States. *See* 28 U.S.C. § 1605(a)(6).

66. Southway v. Central Bank of Nigeria, 198 F.3d 1210 (10th Cir. 1999).

67. *See* 28 U.S.C. § 1330(a) (1994) (stating that "the district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–07 of this title or under any applicable international agreement").

68. 26 Dep't St. Bull 1982 at 984–85.

States applied the absolute theory of sovereign immunity.[69] The U.S. District Court for the Northern District of Illinois decided in the face of contradictory authority in the circuits[70] that the FSIA should be applied to a claim arising from actions prior to 1952.[71] In *Haven v. Rzeczpospolita Polska*,[72] the court found that the FSIA could be applied to a suit arising from the wrongful seizure and expropriation of property in Poland during and after WWII.[73] The Republic of Poland, the defendant, argued that the FSIA does not confer subject matter jurisdiction over the claims because the FSIA was never meant to apply to claims arising from acts prior to 1952.[74] After reviewing the split in the circuits, the court held that applying the FSIA to claims arising from facts before 1952 is not a retroactive application because the FSIA does not affect the substantive rights of the parties.[75] Instead, the court reasoned, the FSIA is a jurisdictional statute, so its application would only determine the tribunal to hear the case.[76]

D. Removal under FSIA

The FSIA allows a defendant foreign state to remove any civil action brought against it in a state court to the U.S. district court where the action is pending.[77] A split in the circuits has developed as to whether the removal provision allows a court to exercise pendant party jurisdiction as to claims over which it would not otherwise have subject matter jurisdiction.[78]

A federal district court in Michigan, without the benefit of authority from the Sixth Circuit, followed the majority position in holding that the removal provision of the FSIA does permit pendent party jurisdiction.[79] In *Consumers Energy Co. v. Certain Underwriters*

69. *See* Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983).

70. *See* Jackson v. Peoples Republic of China, 794 F.2d 1490, 1497–98 (11th Cir. 1986) (stating that it would be unfair to modify the immunity granted to a foreign state in 1911 by enactment of a statute in 1976); Carl Marks & Co., Inc. v. USSR, 841 F.2d 26, 27 (2d Cir. 1988) (noting that the retroactive application of the FSIA before 1952 would adversely affect the USSR's expectation of immunity from suits in U.S. courts); *Creighton Ltd.*, 181 F.3d at 124 (recognizing that a 1988 amendment to the FSIA could be applied retroactively because such application does not effect the party's substantive right, but merely changes the court that will hear the case).

71. *See* Haven v. Rzeczpospolita Polska, 68 F. Supp. 2d 943, 946 (N.D. Ill. 1999).

72. *Id.*

73. *Id.* at 946.

74. *See id.* at 944.

75. *Id.* at 946.

76. *Id.*

77. 28 U.S.C. § 1441(d).

78. *See In re* Air Crash Disaster Near Roselawn, Indiana, 96 F.3d 932 (7th Cir. 1996) (stating that a foreign sovereign may remove an entire case to federal court, not just third-party claims against it); *In re* Surinam Airways Holding Co., 974 F.2d 1255 (11th Cir. 1992) (noting that once a foreign defendant invoked federal jurisdiction by seeking removal, the district court was required to hear both third-party claims and other claims); Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990) (finding that a federal court has jurisdiction over an entire suit even when parties are not diverse and underlying claims do not present federal question); Nolan v. Boeing Co., 919 F.2d 1058 (5th Cir. 1990) (holding that a foreign sovereign may remove an entire suit under removal provisions); Schlumberger Indus. Inc. v. National Surety Corp., 36 F.3d 1274 (4th Cir. 1994) (opining that pendent party jurisdiction over additional parties is not allowed after a foreign sovereign has been dismissed).

79. Consumers Energy Co. v. Certain Underwriters at Lloyd's London, 45 F. Supp. 2d 600, 610 (E.D. Mich. 1999).

at Lloyd's London,[80] the plaintiffs sought a declaration of coverage for environmental contamination costs. One of the defendant liability insurers was a foreign state, which removed the case to federal court pursuant to the FSIA removal provision. The plaintiff dismissed the foreign state as a defendant and moved to remand the case to state court. The court held that it lacked discretion to remand the case because of the existence of cross claims against the foreign state, which continued to vest the court with jurisdiction.[81]

E. Tiering of Ownership Interests

The FSIA applies to defendants that fall within the definition of a "foreign state" or an "agency or instrumentality" of a foreign state.[82] An "agency or instrumentality" of a foreign state includes any separate legal person that is an organ of a foreign state or political subdivision "or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision . . . and which is neither a citizen of the United States . . . nor created under the laws of a third country."[83] Courts have disagreed on whether entities that have "tiered" ownership structures and that, as a result, are indirectly owned by sovereigns[84] constitute foreign states for purposes of the FSIA.[85]

The U.S. District Court for the Eastern District of Louisiana held a corporation that is majority owned by a corporation that is majority owned by the People's Republic of China is a foreign state for purposes of the FSIA.[86] In *In re Clearsky Shipping Corp.*, the plaintiffs sued the owners of a barge that collided with a portion of the New Orleans riverfront known as the Riverwalk. Defendants argued that the indirect ownership of the vessel by the People's Republic of China was sufficient enough to establish sovereign immunity under the FSIA. Without guidance from the Supreme Court or the Fifth Circuit, the court looked to and agreed with the Seventh Circuit's analysis that each tier of majority ownership structure satisfies the definition of agency or instrumentality and equates with a foreign state for purposes of the FSIA.[87]

In contrast, the court in *United States Fidelity and Guaranty Co. v. Braspetro Oil Services Co.*[88] found that a corporation indirectly owned by the Brazilian government had sovereign immunity, but did so on the basis of an alter ego analysis rather than on the tiered ownership of the company. In *Braspetro*, the plaintiffs, co-sureties, filed an action for declaratory judgment regarding their obligations on two performance guarantee bonds that they jointly issued to the defendant.[89] The defendant, a Brazilian corporation, argued the court lacked

80. *Id.*

81. *Id.* at 610.

82. 28 U.S.C. § 1603(b).

83. *Id.*

84. An example of tiering is as follows: a foreign state owns a majority of shares of corporation A and corporation A owns a majority of shares in corporation B.

85. *See* Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995) (stating that where an "agency or instrumentality" of a foreign state owns a majority interest in a corporation, that corporation is not a foreign state for purposes of the FSIA, whereas if the foreign state owns a majority interest in a corporation, the corporation is a foreign state for purposes of the FSIA); *In re Air Crash Disaster Near Roselawn*, 96 F.3d 932 (finding that an "agency or instrumentality" of a foreign state is the equivalent of a foreign state, and a corporation that is majority-owned by either a foreign state directly, or by an agency or instrumentality of a state is considered a foreign state).

86. *In re* Clearsky Shipping Corporation, 1999 WL 1021825, 5 (E.D. La. 1999).

87. *Id.* at 4–5.

88. United States Fidelity and Guaranty Co. v. Braspetro Oil Serv. Co., 1999 WL 307666 (S.D.N.Y. 1999).

89. *Id.* at *1.

subject matter jurisdiction over the plaintiffs' claims because it did not constitute a foreign state, as required by the FSIA.[90] The plaintiffs argued that the defendant was an agent or instrumentality of a foreign state because of its indirect ownership by an instrumentality of the Brazilian government.[91] The court noted the split among the circuits on the question of tiering.[92] It then reasoned that, since the defendant was not owned by the Brazilian government directly but rather by an agency or instrumentality of the Brazilian government, the defendant was not a foreign state for purposes of the FSIA.[93]

The plaintiffs next argued that the defendant was an alter ego of its parent corporations and that the parent corporations were agencies or instrumentalities of the Brazilian government.[94] The court agreed that each of the defendant's parent corporations was an agent or instrumentality of the Brazilian government.[95] However, the court found that the defendant corporation met the Supreme Court definition of alter ego,[96] and was therefore entitled to foreign sovereign immunity.[97]

III. International Forum Selection and Forum Non Conveniens

International forum selection clauses are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction."[98] Ever since the Supreme Court's seminal 1971 decision in *M/S Bremen v. Zapata Off-Shore Co.*,[99] U.S. courts have generally enforced such provisions based upon international comity, public policy, and contract law.[100] International forum selection clauses may be challenged only on very limited grounds upon a clear showing that "enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud

90. *See id.* at *5.

91. *See id.* at *6. The Brazilian government had a majority ownership interest in Petroleo Brasileiro S.A.-Petrobras. Petrobras had a majority ownership interest in Petrobras Internacional S.A.-Braspetro. Braspetro had a majority ownership interest in the defendant, Braspetro Oil Services, Co., a Cayman Islands corporation. *See id.* at 1.

92. *Id.* The court examined cases from the Seventh Circuit, *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (recognizing tiering), and the Ninth Circuit, *Gates*, 54 F.3d 1457 (not accepting tiering).

93. *Braspetro Oil Serv. Co.*, 1999 WL 307666, at *1.

94. *See id.* at *7.

95. *Id.* at *8. The court found that both parent corporations were agencies or instrumentalities of the Brazilian government because each corporation had been formed by Brazilian law to act in furtherance of Brazil's oil monopoly, each corporation was majority-owned by the Brazilian government, each corporation was financially responsible to the Brazilian Congress, and the Board of Directors of each corporation was appointed by the president of Brazil.

96. *Id.* First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983). The Supreme Court stated in *First Nat'l City Bank* that an alter ego could be found where either a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, or where recognition of the corporate form would work fraud or injustice. *Id.* at 629.

97. *See Braspetro Oil Serv. Co.*, 1999 WL 307666, at *11.

98. Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974) (upholding an arbitration provision as a specialized form of forum selection).

99. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

100. *See id.* at 10–15 (noting that enforcement of forum selection clauses "is substantially... followed in other common-law countries," "accords with ancient concepts of freedom of contract," and reflects "present-day commercial realities").

or overreaching."[101] In contrast to forum selection clauses, which are by nature contract-based, the doctrine of forum non conveniens more broadly permits courts to "resist imposition upon [their] jurisdiction"[102] if there is an "adequate alternative" forum[103] and the balance of trial conveniences (including private and public interest factors) strongly favors the alternative forum.

The year before the new millennium witnessed a relative paucity of important international forum selection and forum non conveniens developments. Federal appellate and trial courts together issued less than forty reported decisions based upon international forum selection provisions or forum non conveniens considerations. Nearly half of the federal cases originated in New York. Similarly, state appellate panels considered international forum selection clauses or forum non conveniens issues in less than twenty-five reported opinions. Despite the relatively small number of decisions in 1999, several federal and state opinions merit further scrutiny.

A. 1999 Developments on International Forum Selection Clauses[104]

1. *Federal Developments*

The Second Circuit Court of Appeals confirmed the very limited nature of interlocutory appellate review of forum issues in *United States Fidelity and Guaranty Co. v. Braspetro Oil Services Co.*[105] At the trial court level, the defendants unsuccessfully moved to dismiss based on lack of personal and subject matter jurisdiction, a contractual forum selection clause and forum non conveniens. When the defendants appealed the denial of their motion, the Second Circuit substantively considered (and rejected) their challenges to subject matter and personal jurisdiction.[106] The appellate panel, however, refused to review the denial of the forum selection and forum non conveniens motions on an interlocutory basis. Thus, the defendants were left with the unsatisfactory remedy of preserving the forum issues for possible direct appeal after a final judgment.

In a pair of trial level decisions, forum selection provisions that were somewhat ambiguous were construed as permissive rather than mandatory, thus defeating their enforcement. In *Hull 753 Corp. v. Elbe Flugzeugwerke GmbH*, the clause read: "Place of jurisdiction shall

101. *Id.* at 15. Stated another way, forum selection provisions

> "may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state."

Jewel Seafoods, Ltd. v. M/V Peace River, 39 F. Supp. 2d 628, 633 (D.S.C. 1999) (summarizing *Bremen*).

102. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947).

103. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981).

104. A case featured prominently in the 1998 version of this annual update bears some mention: Afram Carriers, Inc. v. Moeykens, 145 F.3d 298 (5th Cir. 1998). *See* Edgard Alvarez, *International Litigation: Forum Selection and Forum Non Conveniens*, 33 Int'l L. 415 (1999). In *Afram*, the Fifth Circuit upheld enforcement of a forum selection clause. In 1999, the Fifth Circuit denied a request for rehearing and suggestion for rehearing en banc. *In re* Afram Carriers, Inc., 157 F.3d 905 (5th Cir. 1998). Also in 1999, the Supreme Court denied certiorari. DePanta v. Afram Carriers, Inc. 525 U.S. 1141 (1999).

105. United States Fidelity and Guaranty Co. v. Braspetro Oil Serv. Co., 199 F.3d 94 (2d Cir. 1999).

106. The court considered the challenge to subject matter jurisdiction pursuant to the collateral order exception to the final judgment rule and then exercised pendent jurisdiction over the personal jurisdiction issues.

be Dresden."[107] The district court determined that the clause allowed, but did not require, the parties to litigate in Dresden, Germany. In *Weiss v. La Suisse*, the provision (translated from French and German) stated that the policyholder has "the right to take any dispute between themselves and 'La Suisse' either before the judge of the competent court of their domicile in Switzerland or in front of the civil court in Lausanne."[108] The district court found that the provision gave the plaintiffs "the right" to bring a lawsuit in Switzerland but did "not compel them to do so or preclude them from suing elsewhere."[109]

In *Jewel Seafoods, Ltd. v. M/V Peace River*,[110] a trial court was confronted with a forum selection clause requiring adjudication of disputes in the People's Republic of China. The case arose from an allegedly damaged maritime transaction governed by the Carriage of Goods by Sea Act (COGSA).[111] Relying on the Supreme Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,[112] the *Jewel Seafoods* court enforced the Chinese forum selection provision. In so doing, the trial court determined that the application of Chinese maritime law did not diminish the plaintiff's right below what COGSA guarantees. The district court also rejected an attack on the adequacy of the Chinese legal system to resolve disputes involving foreign business issues.

2. *State Developments*

An Illinois state appellate court reaffirmed the application of *Bremen* to an international forum selection dispute in *Yamada Corp. v. Yasuda Fire and Marine Insurance. Co., Ltd.*[113] The case involved the enforcement of a clause providing that "coverage disputes arising out of this insurance shall be subject to Japanese law and forum."[114] The trial court refused to enforce the forum selection clause and entered summary judgment for the plaintiff. On appeal, the Illinois appellate court reversed, confirmed adoption of the *Bremen* holding in Illinois and approved reliance on federal cases when interpreting international forum selection clauses.[115] Remanding for dismissal, the appellate court determined that the forum selection clause should be enforced since it was mandatory, not seriously inconvenient or unreasonable and not against Illinois public policy.

B. 1999 Developments on International Forum Non Conveniens

American jurists determined that courts of the following foreign nations provided "adequate alternative" fora for international dispute adjudication in forum non conveniens cases: Canada,[116] Cayman Islands,[117] Columbia,[118] France,[119] Germany,[120]

107. Hull 753 Corp. v. Elbe Flugzeugwerke GmbH, 58 F. Supp. 2d 925 (N.D. Ill. 1999).
108. Weiss v. La Suisse, 69 F. Supp. 2d 449, 454 (S.D.N.Y. 1999).
109. *Id.* at 456.
110. *Jewel Seafoods*, 39 F. Supp. 2d 628.
111. 46 U.S.C. App. § 1300 *et seq.* (1994).
112. Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).
113. Yamada Corp. v. Yasuda Fire and Marine Ins. Co., Ltd., 712 N.E.2d 926 (Ill. App. Ct. 1999).
114. *Id.* at 929.
115. *Id.* at 934.
116. *See In re* Philip Services Corp. Securities Litigation, 49 F. Supp. 2d 629 (S.D.N.Y. 1999); Bravo Co. v. Chum, Ltd., 60 F. Supp. 2d 52 (E.D.N.Y. 1999).
117. *See* Bacardi v. Lindzon, 728 So. 2d 309 (Fla. Dist. Ct. App. 1999), *review granted*, 743 So. 2d 11 (Fla. 1999).
118. *See* Iragorri v. United Technologies Corp., 46 F. Supp. 2d 159 (D. Conn. 1999).
119. *See In re* Air Crash Off Long Island New York, 65 F. Supp. 2d 207 (S.D.N.Y. 1999).
120. *See* Kurzke v. Nissan Motor Corp., 727 A.2d 481 (N.J. Super. Ct. App. Div. 1999).

Greece,[121] Hong Kong,[122] Liechtenstein,[123] Netherlands,[124] Pakistan,[125] Peru,[126] Switzerland,[127] and the United Kingdom.[128]

1. *Federal Developments*

The Fifth Circuit Court of Appeals affirmed a forum non conveniens dismissal in *Dickson Marine Inc. v. Panalpina, Inc.*[129] In *Dickson Marine*, Louisiana corporations brought a property damage action against Gabonese and Swiss corporations concerning a ship that capsized in African coastal waters. The trial court dismissed the Gabonese entity for lack of personal jurisdiction and dismissed a Swiss company for inconvenient forum. On appeal, the Fifth Circuit relied upon a well-accepted Supreme Court forum non conveniens precedent: *Piper Aircraft Co. v. Reyno*[130] and *Gulf Oil Co. v. Gilbert.*[131] The Fifth Circuit, however, also reiterated its somewhat unusual additional requirement of "conditional" forum non conveniens dismissal: "a district court must 'ensure that a plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice and that if the defendant obstructs such reinstatement in the alternative forum that plaintiff may return to the American forum.' "[132] "Conditional dismissals" or stipulations[133] are routine in practice in many jurisdictions but continue to be mandatory in the Fifth Circuit.

The Ninth Circuit Court of Appeals reversed a forum non conveniens dismissal in *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai.*[134] American plaintiffs brought claims for, among other things, defamation and conversion against a Japanese company. The appellate court repeatedly reaffirmed that the foreign defendant bears the burden to show an adequate alternative forum and that choice of law and the balance of private and public interest factors favor dismissal. Utilizing an abuse of discretion standard, the Ninth Circuit reversed the trial court for incorrectly shifting the burden from the foreign defendant to the American plaintiff. The appellate court was critical of the trial court's alternative forum analysis. The trial court's conclusion that Japan provided an adequate alternative forum was determined to be "insufficient" since the trial court "failed to explain what evidence it had that Japan was an adequate forum"[135] and instead simply relied on a previous appellate opinion[136] in

121. *See* Warn v. M/Y Maridome, 169 F.3d 625 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 179 (1999).

122. *See* Turan v. Universal Plan Inv. Ltd., 70 F. Supp. 2d 671 (E.D. La. 1999).

123. *See Bacardi*, 728 So. 2d at 309.

124. *See* Evolution Online Systems, Inc. v. Koninklijke Nederland N.V., 41 F. Supp. 2d 447 (S.D.N.Y. 1999).

125. *See* Bank of Credit and Commerce Int'l (Overseas) Ltd. v. State Bank of Pakistan, 46 F. Supp. 2d 231 (S.D.N.Y. 1999).

126. *See* A.C. Sudduth v. Occidental Peruana, Inc., 70 F. Supp. 2d 691 (E.D. Tex. 1999).

127. *See* Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331 (5th Cir. 1999).

128. *See Warn*, 169 F.3d at 625; Olin Corp. v. Fisons Plc., 47 F. Supp. 2d 151 (D. Mass 1999).

129. *Dickson Marine*, 179 F.3d at 331.

130. *Piper Aircraft*, 454 U.S. at 235.

131. *Gulf Oil*, 330 U.S. 501.

132. *Dickson*, 179 F.3d at 342 (*quoting In re* Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147 (5th Cir. 1987)).

133. Conditions for forum non conveniens dismissal often include the defendant's consent to suit in a foreign nation, the defendant's waiver of statute of limitations defenses, and/or the defendant's agreement to satisfy a foreign judgment if rendered.

134. *Alpha Therapeutic Corp.*, 199 F.3d 1078.

135. *Id.* at 1090.

136. *See* Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991).

which the Ninth Circuit noted that it could "not find a single case in which Japan was held to be an inadequate forum."[137] The *Alpha Therapeutic* case confirms that a solid evidentiary record should be developed to support forum non conveniens dismissal.

Iragorri v. United Technologies Corp.[138] presented an interesting issue concerning the adequacy of Columbia as an alternative forum. In *Iragorri*, surviving relatives of a Florida resident sued an American elevator manufacturer for wrongful death in connection with an elevator shaft accident in Columbia. Opposing a motion to dismiss for forum non conveniens, the plaintiffs asserted that Columbia was an "inadequate" and "inconvenient" forum because of the extremely high crime rate resulting from guerrilla and drug cartel activity, including physical attacks, kidnappings, murders, and threats against Americans. The plaintiffs bolstered their argument with a recent U.S. State Department Travel Advisory warning U.S. citizens against unnecessary travel to Columbia. The Travel Advisory stated that "U.S. citizens have been the victims of recent threats, kidnapping and murders. U.S. citizens in Columbia are currently targets of kidnapping efforts of guerrilla rebels . . . Columbia is one of the most dangerous countries in the world."[139] The district court discounted the Columbia crime and safety issue and, after a cogent analysis of the *Gilbert* factors, determined that Columbia was an adequate alternative forum and dismissed the case for forum non conveniens.

Finally, the Second Circuit's 1998 decision in *Evolution Online Systems, Inc. v. Koninklijke Nederland N.V.*[140] found new life on remand in *Evolution Online Systems, Inc. v. Koninklijke Nederland N.V.*[141] The trial court had originally dismissed the case for forum non conveniens and a mandatory forum selection clause. Troubled by the "brevity and ambiguity of the district court's opinion,"[142] the Second Circuit vacated and remanded. On remand, the district court again dismissed on the grounds of forum non conveniens and the mandatory Netherlands forum selection clause in a cogent, longer, and less ambiguous decision.

2. *State Developments*

State appellate courts in Delaware, Washington, and Florida announced interesting international forum non conveniens decisions in 1999. The Delaware Supreme Court reiterated its unique approach to forum non conveniens analysis in *Ison v. E.I. Dupont de Nemours and Co., Inc.*[143] In *Ison*, foreign citizens whose children allegedly suffered birth defects from their mothers' prenatal exposure to fungicides in foreign countries brought a product liability action against the fungicide manufacturer in Delaware. Dupont, a Delaware corporation headquartered in Delaware, successfully moved the trial court to dismiss the action in favor of adjudication in the home nations of the plaintiffs (New Zealand, England, Wales, and Scotland). The Delaware Supreme Court reversed. After tracing forum non conveniens developments in a variety of other jurisdictions, the appellate panel endorsed its own unique standard. In Delaware, forum non conveniens decisions must be

137. *Alpha Therapeutic Corp.*, 199 F.3d at 1090.

138. *Iragorri*, 46 F. Supp. 2d at 159.

139. *Id.* at 166.

140. *Evolution Online Systems*, 145 F.3d 505. *Evolution Online* featured prominently in last year's update of forum non conveniens developments.

141. *Evolution Online Systems*, 41 F. Supp. 2d at 447.

142. *Id.* at 448.

143. Ison v. E.I. Dupont de Nemours and Co., 729 A.2d 832 (Del. 1999).

guided by the so-called *Cryo-Maid*[144] factors: (a) the relative ease of access to proof; (b) the availability of compulsory process for witnesses; (c) the possibility of a view of the premises; (d) whether the controversy is dependent upon application of Delaware law; (e) the pendency or nonpendency of a similar action in another jurisdiction; and (f) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[145] Nevertheless, "it is not enough that all the *Cryo-Maid* factors may favor defendant" and forum non conveniens dismissal.[146] In Delaware, "the trial court must find '*overwhelming hardship*' to the defendant if the case is to be dismissed."[147] According to the Delaware Supreme Court, "*overwhelming hardship*" is "difficult for a defendant to prove, but is not preclusive."[148] Delaware appears to be the only U.S. jurisdiction that embraces an "overwhelming hardship" threshold. As a consequence, the relatively difficult Delaware forum non conveniens legal standard may make Delaware state courts attractive venues for foreign litigants pursuing actions against companies incorporated in Delaware.[149]

The Washington Court of Appeals did a "turn-about" on the forum non conveniens burden of persuasion. Prior to 1999, Washington case law required the plaintiff to shoulder the burden of proving that the proposed alternative international forum was inadequate.[150] The Washington Court of Appeals reversed this position in *Hill v. Jawanda Transport Ltd.*[151] Now, in line with most other jurisdictions, a defendant in Washington "bears the burden of proving an adequate alternative forum exists."[152]

Finally, an intermediate appellate court in Florida faced a novel question in *Bacardi v. Lindzon*.[153] The case involved fraud claims relating to trusts established in the Cayman Islands and Liechtenstein. The defendant successfully moved the trial court to dismiss the action on forum non conveniens grounds in favor of adjudication in both the Cayman Islands and Liechtenstein. The appellate court affirmed and ruled that the trial court did not abuse its discretion "in dismissing the claims in favor of *various* alternative jurisdictions."[154] In doing so, the appellate court certified for further appellate review "the following question of great public importance: Does the trial court abuse its discretion if it dismisses an action on forum nonconveniens grounds . . . when dismissal requires the plaintiff to refile the claims in more than one alternative jurisdiction?"[155] The Florida Supreme Court recently granted review on this issue.[156]

144. General Foods Corp. v. Cryo-Maid, Inc., 198 A.2d 681, 684 (Del. 1964).

145. *Ison*, 729 A.2d at 838.

146. *Id.* (quoting Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. Partnership, 669 A.2d 104, 108 (Del. 1995)).

147. *Id.*

148. *Id.* at 842.

149. Perhaps concerned that foreign litigants would misuse the Delaware state courts to pursue actions against Delaware corporations maintaining principal places of business outside of Delaware, the Delaware Supreme Court noted several times that Dupont was both incorporated in Delaware *and* had its principal place of business in Delaware. Further, the Delaware Supreme Court specifically declined to express an opinion whether the result would be different if the defendant's only connection was that it was incorporated in Delaware. *See id.* at 843.

150. *See* Wolf v. Boeing Co., 810 P.2d 943 (Wash. Ct. App. 1991), *review denied*, 818 P.2d 1098 (Wash. 1991).

151. Hill v. Jawanda Transport Ltd., 983 P.2d 666 (Wash. Ct. App. 1999).

152. *Id.* at 669.

153. *Bacardi*, 728 So. 2d at 309.

154. *Id.* at 312.

155. *Id.* at 312–13.

156. Bacardi v. Lindzon, 743 So. 2d 11 (Fla. 1999).

IV. Extraterritorial Prescriptive Jurisdiction

The concept of extraterritoriality—the reach of domestic laws beyond national boundaries—has been a matter of great contention among nations.[157] This is especially true in today's global market where nations struggle to define their roles in an economic revolution. The dynamic nature of this global economy forces nations to re-examine the extraterritorial reach of their domestic laws on a continuous basis. The United States is no exception. Throughout its history, the U.S. Supreme Court has labored over the appropriate standard with which to review the extraterritorial application of the laws of the United States. In its two most recent decisions on this issue, however, the Court created more confusion than clarity. This section will review current developments in this area reflecting this confusion.

A. The Supreme Court Speaks

The Supreme Court's 1991 decision in *EEOC v. Arabian American Oil Co. (Aramco)*[158] purportedly established the standard for reviewing the extraterritorial application of U.S. laws. *Aramco* held " 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' "[159] The Supreme Court emphasized that this "presumption against extraterritoriality" could be overcome only by a clearly expressed congressional intent as evidenced by the statutory language at issue.[160] In *Aramco*, the Court did not find the congressional intent to apply Title VII of the 1964 Civil Rights Act extraterritorially.[161]

The *Aramco* majority did not address any of the other principles of extraterritoriality previously relied upon by lower courts. In *Timberlane Lumber Co. v. Bank of America*,[162] for example, the Ninth Circuit had applied a "tripartite analysis" to the extraterritorial application of the Sherman Act.[163] That court looked to whether the conduct at issue had an actual or intended effect on U.S. foreign commerce, whether the conduct was of a sufficient magnitude to justify the application of U.S. law, and whether U.S. interests were sufficiently strong relative to those of other nations to justify the assertion of extraterritorial authority.[164]

The *Aramco* decision also failed to acknowledge section 403 of the *Restatement (Third) of*

157. Extraterritorial application of U.S. laws refers to the prescriptive jurisdiction of U.S. courts where (1) the conduct at issue occurs within the United States, but its effects occur abroad; (2) the conduct occurs abroad, but its effects occur in the United States; or (3) both the conduct and its effects occur abroad. *See* William Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berk. J. Int'l Law 85, 87–88 (1998) (citing to Andreas Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 Recueil des Cours 9, 43 (1994-I)).

158. EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991).

159. *Id.* at 248 (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)); see also Smith v. United States, 507 U.S. 197 (1993) (presumption against the extraterritoriality limits reach of Federal Tort Claims Act).

160. *Id.*

161. *Id.* at 249–57.

162. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).

163. *Id.* at 613–15; *see* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1291–92 (3rd Cir. 1979) (finding an extraterritorial application of Sherman Act appropriate where conduct had intended an actual effect upon U.S. imports and exports).

164. *See Timberlane Lumber Co.*, 549 F.2d at 613–15.

Foreign Relations.[165] The *Restatement* applies a reasonableness standard to extraterritorial application of law and lists a variety of factors that should go into that determination, including a balancing of the relative interests of the competing states in the application of their laws.[166]

Two years later, in *Hartford Fire Insurance Co. v. California*,[167] the Supreme Court once again addressed the extraterritorial reach of the Sherman Act. The *Hartford* majority followed the *Aramco* majority in avoiding any discussion of section 403 of the *Restatement*, but the two decisions otherwise substantially diverge. Most significantly, the *Hartford* majority ignored *Aramco's* presumption against extraterritoriality.[168] Instead, the *Hartford* majority focused on whether there was any "true conflict" between the relevant U.S. law and the laws of the home country of the foreign parties.[169] The majority suggested that a "true conflict" would exist only if a foreign party's obligations under U.S. laws caused it to violate the laws of its nation. In the absence of a "true conflict," the *Hartford* majority concluded that U.S. antitrust laws reached foreign conduct that had a "substantial intended effect" in the United States.[170] The Court addressed the comity arguments raised by the defendants by noting that Congress had not expressed itself on the question of whether a court should ever decline to exercise Sherman Act jurisdiction on grounds of international comity.[171] The Court, however, went on to state that it did not have to address the question because "international comity would not counsel against exercising jurisdiction in the circumstances alleged here."[172] Although *Hartford* was limited to the extraterritorial application of the Sherman Act, at least one commentator argued that its effect would be to give lower federal courts greater discretion in determining the extraterritorial reach of other U.S. laws.[173]

The 1999 decisions of the lower federal courts indicate that they have indeed taken varied approaches in determining the extraterritorial reach of U.S. laws. Those decisions generally avoided discussion of the principle of comity and the *Restatement* test, preferring to focus

165. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

166. The "reasonableness" factors listed in Restatement Section 403(2) include (a) the link of the activity or its effects to the regulating state, (b) the connections between the regulating state and the persons whose activity is to be regulated or who the regulation is designed to protect, (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulations is generally accepted, (d) the existence of justified expectations that might be protected or hurt by the regulation, (e) the importance of the regulation to the international political, legal, or economic system, (f) the extent to which the regulation is consistent with the traditions of the international system, (g) the extent to which another state may have an interest in regulating the activity, and (h) the likelihood of conflict with regulation by another state. Section 403(3) provides that where a reasonable exercise of jurisdiction is in conflict with regulation of another state, courts should evaluate the relative interests of the competing states in the regulation at issue in light of all the relevant factors.

167. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

168. *Id.* at 795–99. Justice Scalia dissented, arguing for use of the presumption against extraterritoriality, a comity analysis, and section 403 of the *Restatement*. *See id.* at 814, 817–19.

169. *Id.* at 798–99; *see also* Societe Nationale Industrielle Aerospatiale v. United States, 482 U.S. 522, 555 (1987).

170. *Hartford Fire Ins.*, 509 U.S. at 798.

171. *Id.*

172. *Id.*

173. Larry Kramer, Note, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750 (1995). *See generally* Andreas Lowenfeld, Comment, *Conflict, Balancing of Interests, and the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case*, 89 AM. J. INT'L L. 42 (1995); Philip Trimble, Comment, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53 (1995).

on the particular facts and law at issue in each case. The lower federal courts also applied the presumption against extraterritoriality sparingly.

B. Agency Rules and Regulations

1. *FCC—Indirect Regulation of Foreign Carriers*

In *Cable & Wireless P.L.C. v. Federal Communications Commission.*,[174] the U.S. Court of Appeals for the District of Columbia Circuit upheld a Federal Communications Commission (FCC) order limiting the maximum settlement rates that U.S. carriers could pay to foreign carriers for calls terminating abroad.[175] The foreign carriers contended that the order was an improper exercise of extraterritorial jurisdiction, forcing foreign carriers to lower the settlement rates they charged U.S. carriers. The *Cable* court disagreed, holding that the order appropriately regulated U.S. carriers that were involved in foreign telecommunications—the type of regulation contemplated by the Communications Act.[176] The court reasoned that the only purpose of the order was to ensure a level playing field for all U.S. carriers and not to regulate foreign carriers.[177] The D.C. Circuit recognized that, as a practical matter, the order would have some extraterritorial ramifications by "reduc[ing] settlement rates charged by foreign carriers," but found that the "extraterritorial consequences" of the order were well within the FCC's regulatory authority.[178]

The foreign carriers also claimed that the order violated the principle of international comity because it could result in a conflict with the regulatory obligations prescribed by other governments.[179] The court dismissed this argument, noting that the foreign carriers were unable to show an actual conflict with the regulations of other governments. This was essentially an application of the "true conflict" analysis of the Supreme Court in *Hartford.*[180]

2. *FTC—Extraterritoriality of the FTC's Unfair Trade Provisions—Different Views Among the Circuits*

Fifty-six years ago, in *Branch v. Federal Trade Commission*,[181] the U.S. Court of Appeals for the Seventh Circuit held that the unfair trade provisions of the Federal Trade Commission Act (FTC Act)[182] applied to the conduct of a U.S. citizen who sold correspondence study courses by mail throughout Latin America. *Branch* thus extended the reach of the FTC's unfair trade provisions to the extraterritorial conduct of U.S. citizens.[183] In *Nieman v. Dryclean U.S.A. Franchise Co.*,[184] the U.S. Court of Appeals for the Eleventh Circuit again considered whether the unfair trade provisions of the FTC Act apply extraterritorially, this time in the context of the FTC franchise rule (the Franchise Rule).[185]

174. Cable & Wireless P.L.C. v. Federal Communications Comm'n, 166 F.3d 1224 (D.C. Cir. 1999).

175. *See* International Settlement Rates, 12 F.C.C. Rcd. 19,806 (1997).

176. *See Cable & Wireless*, 166 F.3d at 1230; 47 U.S.C. §§ 151–714, 152(a), 201 (1999).

177. *Cable & Wireless*, 166 F.3d at 1230.

178. *Id.* (citing Radio Television S.A. de C.V. v. Federal Communications Comm'n, 130 F.3d 1078, 1082 (D.C. Cir. 1997); R.C.A. Communications, Inc. v. United States, 43 F. Supp. 851, 854–55 (S.D.N.Y. 1942)).

179. *See id.*

180. *Hartford Fire Ins.*, 509 U.S. at 798–99.

181. Branch v. Federal Trade Comm'n, 141 F.2d 31 (7th Cir. 1944).

182. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1999).

183. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 282 (1952).

184. Nieman v. Dryclean U.S.A. Franchise Co., 178 F.3d 1126 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 938 (2000).

185. 16 C.F.R § 436.1 (1999).

The *Nieman* court began by citing *Aramco*'s presumption against the extraterritorial application of U.S. law in the absence of express congressional intent that the law should be applied extraterritorially.[186] The court noted plaintiff's argument that the FTC Act applies to "commerce," which is defined to include foreign commerce, and his citation to *Branch* for the proposition that the FTC Act applies to extraterritorial conduct.[187] The court, however, distinguished the *Branch* decision as having been based on the effect of the extraterritorial conduct on the defendant's domestic competition.[188] The *Nieman* court found no evidence that the conduct before it had any effect on domestic competition.[189]

The Eleventh Circuit then looked to the statutory language and found that "[t]he provisions in the FTC Act that Nieman points to as supporting extraterritorial application of the Act are at best ambiguous and, more importantly, are virtually identical to those that the Supreme Court found *not* to support extraterritorial application of Title VII of the Civil Rights Act of 1964."[190] Based on this, as well as the lack of any evidence (from either the Federal Trade Commission's (FTC) initial adoption of the Franchise Rule or its proposed amendments to the rule) that the FTC viewed its own rule as having applicability to the sale of franchises overseas, the court held that the district court erred in granting summary judgment to plaintiff.[191] Notwithstanding the efforts of the *Nieman* court to distinguish the facts before it from those in *Branch*, it seems clear that there is a potential conflict among the circuits regarding the extraterritorial application of the FTC Act.

C. Copyright Act—Recovery of Extraterritorial Damages for an Infringing Act Completed Abroad

Last year, in *Los Angeles News Service v. Reuters Television International, Ltd.*,[192] the U.S. Court of Appeals for the Ninth Circuit held that, under the Copyright Act of 1976,[193] a copyright holder could "recover extraterritorial damages . . . from extraterritorial exploitation of an infringing act that occurred in the United States."[194] The court emphasized, however, that a copyright holder could recover these extraterritorial damages only if an infringing act was "completed entirely within the United States."[195] In *Reuters*, the defendant reproduced the copyrighted work entirely in New York, but then transmitted the reproduced work abroad via satellite.[196] Hence, the plaintiff was entitled to damages based on the overseas distribution of the infringing copies.

In *NFL v. PrimeTime 24 Joint Venture*,[197] the district court in New York found unworkable the *Reuters* requirement that acts of infringement must be completed within the United

186. *Nieman*, 178 F.3d at 1129; *see Aramco*, 499 U.S. at 248.

187. *Nieman*, 178 F.3d at 1130.

188. *Id.*

189. *Id.* The Court also noted that the Seventh Circuit decision was only persuasive authority and had been essentially superseded by the Supreme Court's decision in *Aramco*. *See id.*

190. *Id.* (citing *Aramco*, 499 U.S. at 249–51).

191. *Id.*

192. Los Angeles News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987 (9th Cir. 1998).

193. Copyright Act of 1976, 17 U.S.C. §§ 101–1101 (1999).

194. *Los Angeles News Serv.*, 149 F.3d at 992.

195. *Id.* (citing Allarcom Pay Television, Ltd. v. General Instrument Corp., 69 F.3d 381, 387 (9th Cir. 1995)).

196. *Id.* at 991.

197. NFL v. PrimeTime 24 Joint Venture, 1999 U.S. Dist. LEXIS 3592 (S.D.N.Y. 1999) (denying PrimeTime's motion to dismiss).

States. The defendants in *PrimeTime* captured over-the-air broadcasts of NFL games and then immediately retransmitted them via satellite for broadcast to an audience abroad.[198] The district court noted that *Reuters* created a loophole in the Copyright Act because it allowed anyone to "reach into the United States, capture the first transmission of signals from the United States, and retransmit those signals . . . within its borders without liability . . . to the holder of United States copyright."[199] In the absence of any Second Circuit precedent, the district court in *PrimeTime* held that the defendant's capture of the over-the-air signals constituted a "domestic predicate act" of copyright infringement sufficient to impose liability, whether or not the act was completed abroad.[200] The U.S. Court of Appeals for the Second Circuit has not yet weighed in on this issue.

D. Lanham Act—Rejecting Trade Name Claims by Cuban Companies

In 1998, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (the Omnibus Appropriations Act).[201] Section 211 of the Omnibus Appropriations Act prohibited Cuban companies from asserting a claim[202] to a trade name previously used by a business that was confiscated by the Cuban government.

In *Havana Club Holding, S.A. v. Galleon, S.A.*,[203] a Cuban-Spanish conglomerate, Havana Club Holding, S.A. (HCH), unsuccessfully challenged the application of section 211. At issue was the use of the trade name "Havana Club," which originally belonged to a Cuban business confiscated by the Castro regime.[204] In 1997, the original owners of the trademark sold their rights to defendant Galleon, S.A., which marketed "Havana Club" products in the United States.[205] Plaintiff HCH used the "Havana Club" name in a number of countries but had never sold products with that name in the United States because of the Cuban embargo (although U.S. travelers to Cuba were allowed to bring back "Havana Club" products for personal use).[206]

In this context, HCH brought an action against Galleon, asserting its rights to the "Havana Club" name. The *Galleon* court found that HCH was using a trade name previously used by a confiscated Cuban business.[207] Thus, not only did section 211 prevent it from asserting a trade name violation, but it also trumped HCH's trademark rights under any treaty to which the United States was a signatory.[208] The *Galleon* court further dismissed HCH's false designation of origin claim because HCH and Galleon did not compete in the

198. Defendant argued that the act of infringement was not completed in the United States because it simply transmitted the intercepted signals for rebroadcast outside of the country and did not "perform the copyrighted work[s] publicly" within the United States as required by 17 U.S.C. § 106(4). *Id.* at *4.

199. *Id.* at *8.

200. *Id.* at *10 (quoting Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 1996 U.S. Dist. LEXIS 18653, at *14 (S.D.N.Y. 1996)).

201. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, 112 Stat. 2681 (1998).

202. *Id.* § 211; *see* 15 U.S.C. §§ 1126(b) and (e) (1999).

203. Havana Club Holding, S.A. v. Galleon, S.A., 62 F. Supp. 2d 1085 (S.D.N.Y. 1999), *aff'd* 203 F.3d 116 (2d Cir. 2000).

204. *Id.* at 1089-90.

205. *See id.* at 1090.

206. *See id.* at 1089.

207. *Id.* at 1091-92.

208. *See id.* at 1092-93.

U.S. market, and, therefore, HCH lacked standing to bring a false designation of origin claim.[209] The court noted that the Lanham Act could reach activities outside of the United States but found it unnecessary to perform an extraterritoriality analysis because HCH could not show that it competed with Galleon anywhere in the world.[210]

E. Resurgence of the *Restatement* Test?

Chief Judge Posner's opinion in *Spinozzi v. ITT Sheraton Corp.*[211] gave a small boost to the *Restatement* test. The *Spinozzi* court had to decide whether U.S. tort law applied to a negligence action based on a personal injury that took place entirely in a foreign nation. An American couple sued a Mexican hotel for damages resulting from injuries the husband sustained at the hotel.[212] Judge Posner applied a conflict of laws analysis that resulted in the application of Mexican law that would bar the claim because of the doctrine of contributory negligence.[213] He bolstered that analysis by referring to section 403(1) of the *Restatement* test and summarily concluding that it would be unreasonable to permit courts in Illinois applying Illinois law effectively to set safety standards for Mexican hotels.[214]

F. Conclusion

As these decisions suggest, the lower federal courts have avoided a generic approach in determining the extraterritorial reach of U.S. laws. Instead, these courts have examined the law and facts before them on a case-by-case basis, tailoring their decisions to meet the challenges of a continually evolving principle.

V. Choice of Law in International Litigation

A. Choice of Law and the Berne Convention[215]

In *Bridgeman Art Library, Ltd. v. Corel Corp.*,[216] the U.S. District Court for the Southern District of New York held that the Convention for the Protection of Literary and Artistic Works (the Berne Convention) does not require a U.S. court to enforce international copyright protection of works that do not satisfy the "originality" standard required for copyright protection under U.S. federal copyright law. The plaintiff claimed that the defendant's reproductions of the plaintiff's color transparencies of works of art in the public domain infringed the plaintiff's British copyrights.

209. *Id.* at 1098–99; *see* 15 U.S.C. § 1125(a).

210. *Id.* at 1097 n.10 (citing *Fun-Damental Too, Ltd.*, 111 F.3d at 1006.) "To determine when the extraterritorial application of [Lanham] Act is proper, a court must . . . [consider] . . . (1) whether defendant's conduct has substantial effect on United States commerce; (2) whether defendant is United States citizen; and (3) whether there is conflict with trademark rights established under foreign law." *Id.*

211. Spinozzi v. ITT Sheraton Corporation, 174 F.3d 842 (7th Cir. 1999).

212. *See id.* at 843.

213. *Id.* at 844–46.

214. *Id.* at 845.

215. Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 *available at* <http://www.law.cornell.edu/treaties/Berne/overview.html> [hereinafter Berne Convention].

216. Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

The district court initially dismissed the plaintiff's copyright infringement claim because the works in question were not "original" and therefore not "copyrightable" as a matter of British law.[217] On reconsideration, the court reviewed whether a work's eligibility for copyright protection should be determined using the law of the country where the work originated or the law of the forum where protection is sought.

Choice of law questions do not often arise under the Berne Convention. That Convention is subject to a rule of national treatment whereby the extent of protection and means of redress accorded to a holder of a copyright are determined under the laws of the country where protection is sought.[218] In *Bridgeman*, however, the court was not addressing the *nature* of the protection sought, but rather *whether* the subject was eligible for copyright protection at all.[219] To address this question, the court had to decide whether to apply British or U.S. copyright law to determine if transparencies of public domain works are copyrightable.

In making its determination, the court considered (1) whether or not the Berne Convention requires a State Party to extend national treatment to a foreign copyright *only* in cases involving subject matters eligible for similar protections under its own law and (2) whether U.S. courts may give effect to provisions of the Berne Convention that might require that the existence of a copyright be determined under the law of another state.[220]

As a preliminary matter, the court held that the Berne Convention is not self-executing.[221] Hence, any copyright protection applied by U.S. courts to a "Berne Convention work" is subject to U.S. implementing legislation, including the U.S. Copyright Act as amended by the Berne Convention Implementing Act of 1988 (BCIA).[222] The U.S. Copyright Act limits copyright protection to "original works."[223] The court therefore held that the United States' adherence to the Berne Convention does *not* require U.S. courts "to extend copyright protection to foreign works which are not 'original' within the meaning of the Copyright Clause."[224] In other words, although the BCIA may extend certain copyright protections to "Berne Convention works," the U.S. Copyright Act is the exclusive source of that protection in U.S. courts.[225]

The court found that the transparencies in question were not "original" under the U.S. Copyright Act and were therefore not eligible for U.S. copyright protection.[226] Even though the court's choice of U.S. law had rendered the question moot, the court nevertheless reviewed British copyright law, only to conclude the transparencies were also ineligible for copyright protection under that law.[227] The *Bridgeman* court's analysis suggests, at least as

217. *Id.* at 192.

218. *See id.* at 194 (citing Berne Convention, *supra* note 215, arts. 5(1)-(2)).

219. *Id.* ("While the nature of the protection accorded to foreign copyrights in signatory nations . . . is spelled out in the [Berne] Convention[], the position of the subject matter of copyright thereunder is less certain").

220. *Id.* at 194–95.

221. *Id.* at 195.

222. Berne Convention Implementing Act of 1988, Pub. L. No. 100–568, 102 Stat. 2853, (codified as amended at 17 U.S.C. § 101 *et seq.* (1988)); *see* 17 U.S.C. § 104(b) ("The works, when published, are subject to protection . . . if—. . . the work is a Berne Convention work. . . .").

223. 17 U.S.C. § 102(a) ("Copyright protection subsists . . . in original works of authorship. . . .").

224. *Bridgeman*, 36 F. Supp. 2d at 195 (citing U.S. CONST. art. 1, § 8, cl. 8).

225. *See id.*

226. *Id.*

227. *Id.* at 199.

a theoretical matter, that U.S. courts may deny copyright protection to "Berne Convention works" that are not "original" as a matter of U.S. law, even if they are otherwise subject to valid foreign copyrights.

B. Choice of Law and the Authority to Waive Sovereign Immunity

In *Aquamar v. Del Monte Fresh Produce*,[228] a case involving the Foreign Sovereign Immunities Act (FSIA),[229] the Eleventh Circuit Court of Appeals held that the question of whether an ambassador had the authority to waive immunity on behalf of his sovereign principal was governed by customary international law rather than the law of the sovereign state in question or the law applicable to the substance of the claim presented. The case concerned the Ecuadorian Ambassador to the United States who allegedly waived sovereign immunity on behalf of an agency of the Republic of Ecuador. The district court held that the Ambassador did not have the authority to waive sovereign immunity under Ecuadorian law. On appeal, the Eleventh Circuit rejected the district court's application of Ecuadorian law, applied customary international law, and reversed the district court's decision.

The Eleventh Circuit reasoned that neither the FSIA nor its legislative history indicates clearly what law controls questions of the authority of a person to waive the sovereign immunity of a "foreign state" under the FSIA.[230] The FSIA does not specify the law to govern questions of liability of foreign states where they are found to have no immunity. According to the court, however, questions not pertaining to liability (e.g., the effectiveness of a purported waiver of sovereign immunity) should be "governed by a uniform federal rule."[231] The court cited the legislative history of the FSIA and notions of comity and reciprocity among nations regarding judicial treatment of foreign sovereigns and held that customary international law should inform its findings as to an ambassador's authority to waive sovereign immunity.[232]

> [W]e interpret the issue before us in light of customary international law, which generally is easily accepted abroad and is more easily ascertainable than divergent local laws.
>
> . . . Requiring the courts to look to a sovereign's local law to determine the authority of any agent who purports to waive sovereign immunity, even if that agent is an ambassador, would hinder the goals of the FSIA and its waiver provision.[233]

The court further held that under principles of customary international law there is a rebuttable presumption that an ambassador possesses the requisite authority to waive sovereign immunity that may not be overcome, absent compelling evidence making it "obvious that he or she does not."[234] The court stated, however, that ambassadors should not be deemed authorized to waive a foreign state's immunity in all cases, citing a Second Circuit decision that required a showing that the ambassador "possessed the apparent authority" to waive Antigua's sovereign immunity.[235] The *Aquamar* court noted, notwithstanding the

228. Aquamar v. Del Monte Fresh Produce, 179 F.3d 1279 (11th Cir. 1999).

229. Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), and 1602–11) (1999).

230. *Aquamar*, 179 F.3d at 1293.

231. *Id.* at 1293–94.

232. *Id.* at 1294–95.

233. *Id.* at 1295, 1298.

234. *Id.* at 1299.

235. *Id.* (citing First Fidelity Bank, N.A. v. Antigua & Barbuda—Permanent Mission, 877 F.2d 189 (2d Cir. 1989)). The Eleventh Circuit found in the *Aquamar* case, however, that it did not need to conduct a traditional apparent authority analysis "because a finding of apparent authority requires reliance, which will rarely exist when a court first considers an explicit waiver made in the course of judicial proceedings." *Id.* at 1299 n.42.

fact that the Second Circuit did not rely on customary international legal principles to reach its result, that the court nevertheless arrived at essentially the same conclusion, namely that "courts should accept ambassadors' authority absent 'obvious' evidence that they lack it."[236]

C. Choice of Law and the Hague Convention on the Civil Aspects of International Child Abduction[237]

In a case of first impression, the Ninth Circuit Court of Appeals held that under the Hague Convention on the Civil Aspects of International Child Abduction (the Hague Convention), the reference in article 3 to "the law of the State in which the child was habitually resident" includes the conflict of laws rules of that state.[238] In *Shalit v. Coppe*, the issue before the court was whether the son of an American mother and an Israeli father must be returned to Israel because the mother's retention of the child in Alaska was "wrongful" within the meaning of the Hague Convention.

Article 3 of the Hague Convention provides, in relevant part, that where a child has been removed or retained wrongfully the removal or retention is "in breach of rights of custody attributed to a person . . . *under the law of the State in which the child was habitually resident* immediately before the removal or retention."[239] The court, relying on the official commentary to the Hague Convention, held that the "law of habitual residence" includes the conflict of laws rules of that state.[240]

The court found the state of habitual residence of the child in question to be Israel, and concluded it would need to consult Israeli conflict of laws rules to determine whether U.S. or Israeli law controlled whether the father's custodial rights had been violated. The father's attorney failed to address the conflict of laws question, instead simply asserting the father's custodial rights under Israeli law. The court found a mere statement of rights under Israeli law was insufficient to establish that custody rights had been violated and, after consulting three sources of rights of custody enumerated in the Hague Convention, affirmed the district court's grant of summary judgment to the mother.

D. *Lex Loci Delicti* Applies as Default Rule

In *Spinozzi*,[241] the Seventh Circuit Court of Appeals reverted to the "ancient regime of conflict of laws" and held that the *lex loci delicti* was presumptively the applicable law in the tort context, despite Illinois' adoption of the more modern "most significant relationship" test of the *Restatement of Conflict of Laws*.[242] The case arose out of an injury sustained by Dr. Spinozzi, an Illinois resident, who fell into a maintenance pit at the Sheraton Acapulco Resort where he and his wife were vacationing in Mexico. In his suit for damages, Dr. Spinozzi asserted that Illinois tort law (with its comparative negligence doctrine) should apply over Mexican tort law (with its contributory negligence doctrine). The U.S. District

236. *Id.* (citing *First Fidelity*, 877 F.2d at 192).

237. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, art. 3, T.I.A.S. No. 11,670 [hereinafter Hague Convention].

238. *See* Shalit v. Coppe, 182 F.3d 1124, 1128–29 (9th Cir. 1999).

239. *Id.* at 1128 (citing Hague Convention, *supra* note 237, art. 3(a) (emphasis added)).

240. *Id.* at 1127.

241. *Spinozzi*, 174 F.3d 842.

242. *Id.* at 844.

Court of the Northern District of Illinois held that Illinois conflict of laws rules mandated application of Mexican law which, in light of the court's finding of contributory negligence, barred any and all recovery. The Seventh Circuit Court of Appeals—upholding the lower court's finding of contributory negligence[243]—agreed.

Under Illinois choice of law rules, a court must apply the "most significant relationship" test to determine the law applicable to a tort claim. The Seventh Circuit, however, emphasized the importance of the old rule of *lex loci delicti* in that analysis. The court reasoned that "in the absence of unusual circumstances, the highest scorer on the 'most significant relationship' test is—the place where the tort occurred."[244] The court noted further "the place of injury is presumptively the right law to apply to issues of duty of care" and it would be "unreasonable that the Illinois courts should be setting safety standards for hotels in Mexico."[245] The court observed that such a choice of law reasonably would be expected under the circumstance. "We doubt that Dr. Spinozzi would have thought he was carrying his domiciliary law with him, like a turtle's house, to every foreign country he visited. . . . Law is largely territorial, and people have at least a vague intuition of this."[246]

VI. Discovery

A. Introduction

In U.S. federal courts, 28 U.S.C. § 1781–84 and the Federal Rules of Civil Procedure govern international discovery practices. The 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and other treaties may apply in both state and federal courts when witnesses reside in countries that are parties to treaties also ratified by the United States. The seminal case discussing the interplay of federal law and international treaties in discovery matters is *Societe Nationale Industrielle Aerospatiale v. United States*.[247] A recent New Jersey decision indicates that state courts are not bound by *Aerospatiale*.

B. Obtaining U.S. Discovery for Use in Foreign Disputes

Echoing the Second Circuit's recent ruling in *NBC v. Bear Stearns & Co.*,[248] the Fifth Circuit Court of Appeals ruled in *Republic of Kazakhstan v. Biedermann International*[249] that a private commercial arbitration proceeding does not constitute a "foreign or international tribunal" as that term is used in 28 U.S.C. § 1782. Proceedings were instituted by Kazakhstan before the Arbitration Institute of the Stockholm Chamber of Commerce. In an effort to obtain discovery from a non-party to the arbitration proceeding, Kazakhstan petitioned

243. *Id.* at 849 ("A careful person who finds himself in a strange area in a foreign country and can't see the ground in front of him will walk in a slow and gingerly manner to avoid tripping; he will feel his way. . . . [Dr. Spinozzi] had no reason to suppose the surface ahead of him smooth. He strode on regardless. He might as well have been blindfolded. His negligence came close to . . . a conscious assumption of the risk of disaster. . . .").

244. *Id.* at 844.

245. *Id.* at 845.

246. *Id.* at 846.

247. *Societe Nationale*, 482 U.S. 522.

248. NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).

249. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

a U.S. federal district court to order the witness to submit to deposition and produce documents.[250] The trial court ordered the requested discovery.[251]

On appeal, the Fifth Circuit found the term "foreign or international tribunal" to be ambiguous and thus construed it in the context of the statute's purpose.[252] Reviewing the legislative history of 28 U.S.C. § 1782, the Fifth Circuit noted that the term "foreign or international tribunal" had been deliberately substituted for "court in a foreign country" through a 1964 revision of the statute.[253] The court noted that the change was designed to include foreign administrative and quasi-judicial agencies and that "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration."[254] The Fifth Circuit compared the limited nature of discovery in domestic arbitration with the broad discovery sought by Kazakhstan and concluded "[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart."[255] The appeals court reversed the trial court and denied all discovery sought by Kazakhstan.

The holding that U.S. resident non-parties cannot be compelled to produce discovery in the United States to aid foreign arbitrators creates an obvious distinction between domestic arbitration (where procedures are available to obtain needed evidence from non-parties) and foreign arbitration.

C. Obtaining Discovery for U.S. Court Proceedings

A New Jersey appellate court held in *Husa v. Laboratoires Servier SA*,[256] that a party seeking discovery from defendant's employees residing in France must comply with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Convention).[257] Plaintiffs initiated a personal injury action against a French company and sought to depose several high-ranking employees of the defendant living in France.[258] Laboratoires Servier opposed the discovery on the ground that Convention procedures had not been followed. The trial court granted the discovery and did not require the Convention to be followed. Laboratoires Servier appealed.

The appeals court noted that about thirty nations are parties to the Convention, including the United States and France.[259] The Convention's core mechanism is the "Letter of Request" procedure specified by article I,[260] by which the requesting party sends a "Letter of

250. *Id.* at 881.
251. *See id.*
252. *Id.*
253. *Id.*
254. *Id.* at 882.
255. *Id.* at 883.
256. Husa v. Laboratoires Servier SA, 740 A.2d 1092 (N.J. Super. Ct. App. Div. 1999).
257. Convention on Taking Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter Convention].
258. *Husa*, 740 A.2d at 1093.
259. *Id.*
260. *Id.* A Letter of Request under the Convention requires, among other things, that the requesting party specify the (a) authority making the request, (b) description of the proceedings, including the names and addresses of the parties involved, and (c) questions to be asked and/or the documents or other property to be inspected. These are the primary elements of a Letter of Request under art. 3 of the Convention.

Request" to a Central Authority designated by the signatory nation, which forwards it to the other nation's central authority.[261] A "Letter of Request" may be refused if the receiving nation determines that responding to the request would jeopardize its sovereignty or security.[262] France has adopted a "blocking statute," making it a criminal offense to seek or provide documents for use in a foreign judicial proceeding other than as provided by international agreement.[263]

The fundamental question was whether the Convention's discovery procedures are mandatory or an optional discovery method beyond those provided by state rules of procedure. The court noted the U. S. Supreme Court's resolution of this issue in *Societe Nationale*, where Convention discovery procedures were held to be optional and not mandatory in federal courts.[264] While acknowledging the supremacy of *Societe Nationale* as to the interplay between the Convention and the Federal Rules of Civil Procedure, the New Jersey court concluded that it had latitude to determine the relationship between the Convention and New Jersey's procedural rules.[265]

The court noted that *Moake v. Source International Corp.*,[266] a case decided after *Aerospatiale*, had followed its reasoning and held that the Convention would be optional in New Jersey. The *Husa* court observed, however, that this decision would amount to an abrogation of the Convention.[267] Finding this result unworkable given the dramatic increase in international transactions and not in keeping with the spirit and purpose of the Convention, the court fashioned a new rule strengthening the Convention's application in New Jersey state courts. Unless "it is demonstrated that [the Convention's] use will substantially impair the search for truth, which is at the heart of all litigation, or will cause unduly prejudicial delay,"[268] the Convention's procedures must be followed. Applying that standard, the court ordered the plaintiff to seek discovery consistent with the Convention's procedures and request discovery in a different manner only if that proved ineffective.

The New Jersey decision underlines possible differences in the ease of obtaining discovery abroad between federal courts (where the Federal Rules may be used) and certain state courts where the Convention's procedures must be followed.

VII. Personal Jurisdiction

A. Court Interprets Statutes Conferring Jurisdiction to Enforce Arbitral Awards against Foreign Governments, but Declines to Decide Whether Foreign States Are Subject to "Minimum Contacts" Analysis for Personal Jurisdiction

In *Creighton Ltd.*,[269] the plaintiff had secured an arbitral award in France against the government of Qatar, based upon Qatar's improper termination of a construction contract

261. *See* Convention, *supra* note 257, art. 2.

262. *Id.*, art. 12.

263. *See Husa*, 740 A.2d at 1094; *see also* French Penal Law No. 80–538.

264. *See Husa*, 740 A.2d at 1095.

265. *See id.*

266. Moake v. Source Int'l Corp., 623 A.2d 263 (N.J. Super. Ct. App. Div. 1993) (denying application of the Convention because of failure of proof by German defendant that discovery would violate Germany's sovereignty or prove to be more effective than the Federal Rules of Civil Procedure).

267. *See Husa*, 740 A.2d at 1095.

268. *Id.* at 1096–97.

269. *Creighton Ltd.*, 181 F.3d 118.

in the Qatari capital. The plaintiff, a Cayman Islands corporation with offices in Tennessee, then initiated an action to enforce the award in the U.S. District Court for the District of Columbia, which dismissed the action for lack of personal jurisdiction.

The court of appeals affirmed. The court first held that by agreeing to arbitrate in France, Qatar did not waive its sovereign immunity and consent to the jurisdiction of U.S. courts to enforce the award. Although both France and the United States are signatories to the New York Convention, which requires all member states to enforce arbitral awards made in another member state, the agreement to arbitrate in France could not be interpreted as a waiver of sovereign immunity "by implication" under 18 U.S.C. § 1605(a)(1).[270] The court concluded, however, that Qatar's sovereign immunity was abrogated by 18 U.S.C. § 1605(a)(6), relating to actions brought to enforce an arbitral award.[271]

The court of appeals nonetheless affirmed the dismissal for lack of personal jurisdiction. It held that Qatar's contacts with the plaintiff in the United States, which consisted solely of communications relating to negotiating a contract to be performed in Qatar, were not sufficient to satisfy the "minimum contacts" requirement for the exercise of personal jurisdiction.[272] Because the issue had not been argued, the court assumed, without deciding, that a foreign state is a "person" within the meaning of the Fifth Amendment's due process clause.[273] If it is not, there is no "minimum contacts" requirement.[274]

In *Theo H. Davies & Co. v. Republic of the Marshall Islands*,[275] another court of appeals continued the uncertainty as to whether the exercise of personal jurisdiction over foreign states requires minimum contacts. The court stated in a footnote that " 'a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states) . . . is constrained by the minimum contacts required by *International Shoe Co. v. Washington* . . . and its progeny."[276]

B. New Appellate Decisions Continue to Reject Passive Web Site as Basis for Personal Jurisdiction

Several recent cases follow earlier decisions from other federal courts in holding that so-called "passive" Internet web sites do not provide a basis for the exercise of personal jurisdiction in forums where they are accessed. A "passive" web site is one in which the creator simply posts information that is available to anyone who chooses to access it. In *Soma Medical International v. Standard Chartered Bank*,[277] the defendant was a Hong Kong banking corporation with which the plaintiff, a Utah-based Delaware corporation, opened an account. The court held that the bank's purely informational, passive web site, which was available to all users of the Internet and did not appear to be directed specifically at Utah, was not a basis to subject the bank to general personal jurisdiction in Utah.[278] *Mink v.*

270. *Id.* at 122–23.

271. *Id.* at 123–24. The court further held that the statute could be applied retroactively. *Id.* at 124.

272. *Id.* at 127–28.

273. *Id.* at 124–25.

274. As discussed in last year's review, a district court held in 1998 that there is no "minimum contacts" requirement for jurisdiction over foreign states.

275. Theo H. Davies & Co. v. Republic of the Marshall Islands, 174 F.3d 969 (9th Cir. 1998).

276. *Id.* at 975 n.3.

277. Soma Medical Int'l v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999).

278. *Id.* at 1299.

AAAA Development LLC[279] involved only domestic corporations but is significant because the web site encouraged some degree of communication over the Internet. Several unreported district court cases reached similar results.[280]

C. Federal Courts May Decide Issue of Personal Jurisdiction Without First Finding Subject Matter Jurisdiction

In *Ruhrgas AG v. Marathon Oil Co.*,[281] two domestic corporations and a Norwegian affiliate, filed suit in Texas state court against Ruhrgas AG, a German corporation. Although the suit alleged only state law claims, Ruhrgas removed it to the U.S. District Court for the Southern District of Texas, alleging subject matter jurisdiction based upon (1) diversity of citizenship, (2) federal question jurisdiction, and (3) the applicability of an international arbitration agreement. Ruhrgas then moved to dismiss for lack of personal jurisdiction, while the plaintiffs moved to remand to state court for lack of federal subject matter jurisdiction. The district court granted the motion to dismiss, finding that Ruhrgas's contacts with Texas were insufficient to permit the exercise of personal jurisdiction there. The court of appeals reversed the dismissal for lack of personal jurisdiction, holding that, at least in removed cases, the district court was required to decide first the issue of subject matter jurisdiction and could consider personal jurisdiction only after finding the existence of subject matter jurisdiction.

The U.S. Supreme Court reversed the decision of the court of appeals and remanded for a determination of whether the district court properly found personal jurisdiction lacking. The Court explained that, although federalism concerns usually favor the initial determination of subject matter jurisdiction, concerns about judicial economy and restraint can be more important. The issue of subject matter jurisdiction should generally be decided first because it is not difficult to determine. When subject matter jurisdiction presents a difficult or novel question, however, and the issue of personal jurisdiction is relatively straightforward, the latter is appropriately decided first whether or not the case has been removed from state court.[282] The *Ruhrgas* court also stated that such a federal dismissal for lack of personal jurisdiction could be *res judicata* on the issue, thus precluding a subsequent state court action on the same claims.

Another court was also squarely presented with this issue in *Falcon v. Transportes Aeros de Coahuila, S.A.*[283] The defendants in that case had also removed a state court case to federal court. The plaintiff moved to remand for lack of subject matter jurisdiction, and the defendants cross-moved to dismiss for lack of personal jurisdiction or, alternatively, on the ground of forum non conveniens. The district court found that it had personal jurisdiction over the defendants, but on the same day ordered the case remanded for lack of subject matter jurisdiction. The defendants appealed the personal jurisdiction ruling. The court of appeals dismissed the appeal, holding that the ruling on personal jurisdiction was not appealable because a remand order cannot be appealed, the finding on personal jurisdiction

279. Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999).

280. *See* Harbuck v. Aramco, Inc., 1999 WL 999431 (E.D. Pa. 1999); Desktop Techn., Inc. v. Colorworks Reprod. & Design, Inc., 1999 WL 98572 (E.D. Pa. 1999); Brown v. Geha-Werke, 169 F. Supp. 2d 770 (D.S.C. 1999).

281. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

282. *Id.* at 772.

283. Falcon v. Transportes Aeros de Coahuila, S.A., 169 F.3d 309 (5th Cir. 1999).

was not essential to the decision to remand, the issue was not fully litigated, and it would have no preclusive effect.[284]

D. Federal Rule of Civil Procedure 4(k)(2) Interpreted

Rule 4(k)(2) of the Federal Rules of Civil Procedure is in effect a federal "long-arm" statute that authorizes any federal district court to exercise personal jurisdiction over a foreign defendant "with respect to claims arising under federal law" if doing so would not violate the Constitution and the defendant is "not subject to jurisdiction in courts of general jurisdiction of any state."[285] Thus, Rule 4(k)(2) ensures that a federal forum will be available for claims "arising under federal law," so long as the defendant has adequate contacts with the United States, even if the defendant lacks contacts sufficient for any particular state to exercise personal jurisdiction over it. In *United States v. Swiss American Bank Ltd.*,[286] the court of appeals interpreted the meaning of "arising under federal law" for purposes of Rule 4(k)(2) and devised a procedure that makes it easier for plaintiffs to establish lack of jurisdiction over the defendant in any state court.[287]

The United States brought suit in federal district court in Massachusetts against four Caribbean-based foreign banks. The federal government claimed the right to some $7 million in laundered funds that were the fruit of criminal activity. The criminal defendant, who was not a party to the action, had deposited the funds in Antigua. Pursuant to a plea agreement with a Massachusetts resident and concomitant forfeiture order, the funds were forfeited to the United States. Despite apparent knowledge of the order, the Swiss American Bank disbursed $5 million of the funds to the Antiguan government and confiscated the remainder. The U.S. government alleged claims against the bank for conversion, unjust enrichment, and breach of contract.

The defendants moved to dismiss for lack of personal jurisdiction. The district court granted the motion, in the process denying the government's motion for jurisdictional discovery. The government appealed. The court of appeals affirmed the district court's holding that there was no personal jurisdiction in Massachusetts under the Massachusetts long-arm statute.[288] The court of appeals, however, held that the district court improperly analyzed the jurisdictional issue under Rule 4(k)(2) and remanded the case for a further determination on that issue.

First, the court held that a claim "arises under federal law" for purposes of Rule 4(k)(2) if it has federal statutory or common law as its ultimate source. The government's claim to recoup from a bank assets forfeited to the government under federal law satisfies this requirement, notwithstanding that the bank's obligation to its depositor may be governed by state or foreign law.[289]

284. *See id.* at 312–13.

285. Fed. R. Civ. P. 4(k)(2).

286. United States v. Swiss Am. Bank, Ltd., 191 F.3d 30 (1st Cir. 1999).

287. *Id.* at 38.

288. *Id.* at 37–38. The basis for this holding was that the injury occurred where the funds were converted or misappropriated—i.e., in Antigua. Moreover, no contacts with Massachusetts were demonstrated; the account was opened in person in Antigua, and the funds were deposited by wire from other foreign banks. That the funds ultimately originated with a Massachusetts resident was insufficient to establish the requisite "minimum contacts" of the defendants with Massachusetts. *See id.*

289. *Id.* at 45. Rule 4(k)(2) was created to deal with a gap in personal jurisdiction noted by the Supreme Court in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987). Several federal substantive statutes

The court then turned to the procedural issues for establishing jurisdiction under the rule. The defendants had successfully argued in district court that the government had not met its burden under Rule 4(k)(2) because it failed to prove the absence of personal jurisdiction in each of the fifty states. The court of appeals held that the burden on the issue was more properly borne by defendants resisting jurisdiction. Under Rule 4(k)(2), the plaintiff is required to demonstrate that (1) the claim arises under federal law, (2) "personal jurisdiction is not available under any situation-specific federal statute," and (3) the defendant's contacts with the United States as a whole suffice to make the exercise of jurisdiction comport with due process.[290] Under the procedures devised by the court, the plaintiff need merely "certify that, based on the information readily available to the plaintiff and his counsel, the defendant is not subject to suit in the courts of general jurisdiction of any state."[291] The burden of proving amenability to jurisdiction in the court of some specific state then shifts to the defendant.[292] A defendant contesting jurisdiction will rarely advance this argument, however, because it concedes the existence of minimal contacts with the United States and therefore ensures that the action will be able to proceed in another federal or state court.[293] Finally, the court held that the district court should reconsider the government's request for jurisdictional discovery, which might enable it to make out a prima facie case under Rule 4(k)(2).

E. Courts Issue Conflicting Rulings in Distributor Cases

Two recent federal appellate cases involving distributorship agreements illustrate the uncertainty that continues to plague the "minimum contacts" analysis. In *Kernan v. Kurz-Hastings, Inc.*,[294] an injured worker sued the seller of a hot stamping press. The seller removed the action to federal court and filed a third-party complaint for contribution and indemnity against the manufacturer. The manufacturer, a Japanese corporation that did not do business in the United States, moved to dismiss for lack of personal jurisdiction. The district court denied the motion, and the appellate court affirmed. It held that the manufacturer's "exclusive sales rights" agreement with a Pennsylvania-based distributor to sell the manufacturer's products in the United States made it foreseeable that the machines would be sold and used in New York.[295] The manufacturer's contacts with New York were therefore sufficient to subject it to personal jurisdiction in New York on a claim that the press was defective.

A few months earlier, a different court of appeals reached the opposite result in *Guinness Import Co. v. Mark VII Distributors, Inc.*[296] *Guinness* involved a Jamaican brewer (D&G) that

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have particularized service of process provisions. When a federal law created a remedy but failed to provide for service of process, the federal courts would borrow from the service of process provisions of state law. This created a "gap" when the defendant was not amenable to process in any state, but nevertheless had adequate contacts with the United States as a whole. There is apparently no federal statute specifically dealing with extraterritorial service of process and personal jurisdiction in asset forfeiture or conversion cases.

290. *Swiss Am. Bank*, 191 F.3d at 41.

291. *Id.*

292. *See id.* at 42.

293. The plaintiff would then have procedural options such as dismissing, refiling, or transfer. *See id.*

294. Kernan v. Kurz-Hastings, Inc., 175 F.3d 236 (2d Cir. 1999).

295. *Id.* at 243–44.

296. Guinness Import Co. v. Mark VII Distrib., Inc., 153 F.3d 607 (8th Cir. 1998).

signed an agreement giving distributorship rights in the United States to Guinness, an importer that purchased D&G's beers in Jamaica. Guinness declined to resell to Mark VII, a Minnesota-based distributor. The court held that D&G lacked minimum contacts" with Minnesota and was not subject to jurisdiction there on a third-party claim for state law business torts brought by Mark VII. D&G did not direct its activities at Minnesota. To the contrary, Guinness had total control over distribution, including whether to sell in Minnesota at all.[297]

This duo of cases may illustrate the courts' greater willingness to find personal jurisdiction in product-liability cases than in ordinary commercial cases.[298] The Supreme Court's decision in *Asahi*,[299] in which there was no majority opinion, continues to create uncertainty.

VIII. Service of Process Abroad

The past year did not yield any significant federal appellate decisions regarding service of process abroad. Nevertheless, a number of interesting cases involved the tension between the time limits for service imposed under various state laws and the difficulties in effecting timely service abroad. In addition, a Florida district court issued a decision regarding alternative methods of service to Hague Convention signatories.[300] Courts also continued to be divided by the issue of whether the Hague Convention permits service by mail.

A. Service under Federal Rule of Civil Procedure 4(f)

In *WAWA, Inc. v. Christensen*,[301] a Pennsylvania district court addressed the attempted service of a complaint and summons by electronic mail upon a defendant in Denmark. The court noted that the "Judicial Conference Rules Committee has discussed and recommended a change in Federal Rule of Civil Procedure 4 to permit service by electronic transmission," but concluded that, "at this time, email is not a valid means for delivering a summons and complaint to a defendant."[302]

B. Developments under the Hague Convention

1. *Time Limits on Service*

Several courts wrestled with the issue of reconciling the difficulties of effecting service in a foreign nation with the time limits placed on service under various state laws.

In *Prom v. Sumitomo Rubber Industries, Ltd.*,[303] the plaintiff filed suit in a Wisconsin court against a Japanese tire company for injuries sustained in a motorcycle accident. Wisconsin

297. *See id.* at 614–15.

298. *But see, e.g., Brown v. Geha-Werke*, 69 F. Supp. 2d at 770 (finding no personal jurisdiction in product-liability case). The opinion in *Kernan* may also reflect the differing views of judges. In *Guinness*, Judge Heaney dissented. In *Kernan*, sitting by designation, he wrote the opinion of the court.

299. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

300. Convention on the Service Abroad of Judicial and Extrajudicial Documents, *done* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (entered into force Feb. 10, 1969) [hereinafter Hague Convention].

301. WAWA, Inc. v. Christensen, 1999 WL 557936 (E.D. Pa. 1999).

302. *Id.* at *1.

303. Prom v. Sumitomo Rubber Indus., Ltd., 592 N.W.2d 657 (Wis. Ct. App. 1999), *review denied*, 599 N.W. 2d 409 (Wis. 1999).

law required that service be effected within sixty days.[304] The plaintiff filed its action on May 10, 1989, and then forwarded the documents to a U.S. company specializing in service on international entities. After translating the documents into Japanese, the service company forwarded them on July 13, 1989, to the Japanese central authority, which effected service on August 25—sixty-seven days after the complaint was filed. A lower court dismissed the complaint for failure to effect timely service.

On appeal, the plaintiff argued that service was delayed due to circumstances beyond its control and that article 15[305] of the Hague Convention provided for six months to complete service. The court rejected the plaintiff's argument, noting that article 15 merely sets forth the prerequisites to obtaining a default judgment. Specifically, that provision allows for a minimum of six months for the foreign defendant to respond before the entry of default. The court ruled that the Hague Convention does not expressly state a time period for service and does not preempt the time limit established under Wisconsin law.[306] With regard to the plaintiff's argument that the deadline for service was missed due to the inherent delays involved in obtaining service abroad, the court ruled that the sixty-day rule is a "rigid requirement that demands strict adherence."[307] The court also observed that the plaintiff could have met the deadline had it arranged for translation of the documents before filing the complaint.

Other courts exhibited a more flexible approach. In *Roden v. Chain Saws Unlimited*,[308] the court declined to dismiss an action in which service was not timely effected under Connecticut law, stating that given the practical problems associated with serving defendants abroad, courts must be flexible in setting return dates, particularly where, as in this case, there was no showing of actual prejudice to the defendant.

The Ninth Circuit was confronted with a similar issue in *Broad v. Mannesmann Anlagenbau AG*.[309] The plaintiffs brought a diversity action against a German company in the Western District of Washington. The action was filed shortly before the expiration of the limitations period. Under Washington law, service must be effected within ninety days of the filing of the complaint.[310] Service was effected by the German central authority 122 days after the filing of the complaint, with part of the delay attributable to the plaintiffs' failure to have the documents translated into German beforehand. The district court dismissed the complaint for failure to effect timely service, which resulted in the action being barred under the statute of limitations.

On appeal, the plaintiffs argued that the case was appropriate for certification to the Washington Supreme Court due to "the tension it presents between state and international law."[311] The court agreed and noted further that:

304. WIS. STAT. § 801.02 (1999). The time period has since been extended to 90 days. *See* 2000 WIS. LEGIS. SERV. 187, § 7 (West).

305. Hague Convention, *supra* note 300, art. 15. Article 15 provides in pertinent part that: "Each contracting State shall be free to declare that the judge . . . may give judgment even if no certificate of service or delivery has been received, if . . . (b) a period of time of not less than six months, considered adequate by the judge in the particular case, has elapsed since the date of the transmission of the document. . . ." *Id.*

306. *Prom*, 592 N.W.2d at 663.

307. *Id.*

308. Roden v. Chain Saws Unlimited, 1999 WL 195941 (Conn. Super. Ct. 1999).

309. Broad v. Mannesmann Anlagenbau AG, 196 F.3d 1075 (9th Cir. 1999).

310. *See* WASH. REV. CODE ANN § 4.16.170 (West 2000).

311. *Broad*, 196 F.3d at 1077.

> The Hague Convention requires plaintiffs to surrender control of service of process to a designated central authority in a signatory country and wait for an indefinite period of time while it serves the defendant according to the laws of its country. It is unclear whether, under these circumstances, Washington's 90-day time limit for executing service of process applies.[312]

Accordingly, the court requested that Washington's Supreme Court answer the following questions: (1) whether Washington state law deems a designated foreign central authority a "substitute" or "agent" for purposes of meeting Washington's ninety-day time period for service of process and (2) alternatively, whether state law recognizes an exception to the ninety-day time limit for service where "plaintiffs must, under the Hague Convention, relinquish control over serving a defendant to a foreign central authority for an indefinite period of time."[313]

The plaintiffs in *Broad* also argued for reversal on the basis of Federal Rule of Civil Procedure 4(m), which carves out an exception from the 120-day time limit for service under the Federal Rules of Civil Procedure.[314] The court declined to reach this issue, however, until after the state law issues had been addressed.

2. *Preemptive Effect of the Hague Convention*

The extent to which the Hague Convention preempts other methods of service was considered in *Banco Latino, S.A.C.A. v. Lopez*.[315] The plaintiff in *Banco Latino* served the defendant in Spain (a contracting state to the Hague Convention) by personal delivery, rather than through the Spanish central authority.

The court's analysis began with Federal Rule of Civil Procedure 4(f), which permits service via "internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents."[316] Section (f)(2) also allows other means of service reasonably calculated to give notice in instances where "there is no internationally agreed means of service or the applicable international agreement allows other means of service."[317] One of the "other means of service" is delivery of the summons and complaint to the individual personally, provided that this method is not contrary to the law of the foreign county.[318]

In examining whether the Hague Convention permits alternative methods of service of process, the court looked to article 19, which provides that "to the extent the internal law of a contracting state to the Convention allows methods of transmission, other than those" otherwise provided for the Convention, "the Convention shall not affect such provisions."[319] The court noted that article 19 is subject to two different interpretations. The first is that alternative methods of service may be used "[a]s long as the nation concerned has, not, in its ratification or in any other part of its law, imposed any limits on particular methods, or made an unequivocal statement that only specified listed methods may be used."[320] The

312. *Id.* at 1079.

313. *Id.* at 1076.

314. *See, e.g.*, Turpin v. Mori Seiki Co., Ltd., 56 F. Supp. 2d 121 (D. Mass. 1999) (noting that "an exception to the 120-day time limit has been carved out [under FED. R. CIV. P. 4(m)] for service upon defendants in foreign countries").

315. *See* Banco Latino, S.A.C.A. v. Lopez, 53 F. Supp. 2d 1273 (S.D. Fla. 1999).

316. FED. R. CIV. P. 4(f)(1).

317. *Id.* at 4(f)(2).

318. *See id.* at 4(f)(2)(C)(i).

319. Hague Convention, *supra* note 300, art. 19.

320. *Banco Latino*, 53 F. Supp. 2d at 1278.

second view is that article 19 only permits alternative methods of service that are specifically authorized by the foreign country.[321] The court opted for the first interpretation, stating that "[a]rticle 19 should be broadly construed so as to permit service by any means, subject to the Federal Rules of Civil Procedure, not proscribed by the foreign country."[322]

The court then turned to an examination of Spanish law and noted that Spanish law does provide for service by personal delivery, but only by judicial officials, and not by a private individual. Accordingly, the service made on the defendant in the instant case would not have been effective in an action pending in the Spanish courts. Nevertheless, the court did not find this to be determinative, stating that "it is of great importance that the instant litigation is not pending in Spain and that [the defendant] is not a Spanish national."[323] The court held that inasmuch as Spain does not "prohibit" service by a private process server in foreign litigation upon a foreign national, such service was "not contrary to Spanish law" and was therefore permissible under Federal Rule of Civil Procedure 4 and article 19 of the Convention.[324]

The *Banco Latino* decision serves as a useful reminder that the Hague Convention does not, as is sometimes supposed, automatically abrogate all other methods of service in a signatory state. Nevertheless, the court's construction of the word "permits" in article 19 to mean "does not prohibit" seems to unduly impinge upon the sovereignty interests of other contracting states.

3. *Service by Mail under Article 10(a)*

The issue of whether article 10(a)[325] of the Hague Convention authorizes service of process by mail continued to divide the courts, even courts within the same district, as illustrated by two decisions from the Southern District of West Virginia. In *Knapp v. Yamaha Motor Corp.*,[326] the court held that service by mail upon a Japanese defendant was insufficient, thereby following the *Bankston v. Toyota Motor Corp.*[327] line of cases. The court observed that if the drafters of the Convention had intended article 10(a) to provide an additional means of service, "it is reasonable to conclude that they would have used the word 'service,' " which is the term used in the other sections of article 10, "rather than the word 'send,' "[328] which appears in section (a) of that article. The court concluded that article 10(a) was merely intended to allow for the transmission by mail of interlocutory documents, such as discovery requests, after a party has effected service of process.[329] The court gave short shrift to the plaintiff's reliance on the fact that Japan has not specifically objected to service

321. *See id.* (citing G. Brian Raley, *A Comparative Analysis: Notice Requirements in Germany, Japan, Spain, The United Kingdom and The United States*, 10 ARIZ. J. INT'L & COMP. L. 301, 307 (1993)).

322. *Id.* at 1280.

323. *Id.*

324. *Id.*

325. Hague Convention, *supra* note 300, art. 10(a). Article 10(a) states, "[p]rovided the State of destination does not object, the present Convention shall not interfere with the freedom to *send* judicial documents by postal channels, directly to persons abroad." *Id.* (emphasis added). The conflict between the courts arises because elsewhere in the Convention the term "service" is used. Certain courts ascribe the use of the word "send" in article 10(a) to careless drafting. Others have concluded that the choice of the word "send" was deliberate and cannot be construed as synonymous with "service."

326. Knapp v. Yamaha Motor Corp., 60 F. Supp. 2d 566 (S.D. W. Va. 1999).

327. Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989); *see also Prom*, 592 N.W. 2d 657.

328. *Knapp*, 60 F. Supp. 2d at 571.

329. *See id.*

by postal channels, noting that "Japan could quite reasonably have concluded that there was no need to object."[330]

In another case in the same district, *Randolph v. Hendry*,[331] the court adopted the contrary view set forth in the *Ackermann v. Levine*[332] line of cases. The court concluded that not reading article 10(a) to allow for service of process "would impermissibly isolate article 10(a) from the overall context of the Convention," which is designed to address "only" the issue of service of documents abroad.[333] The court stated further that "practical considerations" undermined the view that article 10(a) serves merely to permit service of interlocutory documents other than process. Noting that states may opt out of article 10(a), the court reasoned that adopting the view in the *Bankston* line of cases would logically "forbid the use of the mails entirely," which would then necessitate every judicial document in the litigation travelling through the central authority, even after service of process had been effected.[334] The court opined that this could not have been the result intended by the drafters of the Convention. The *Randolph* court also held that service under article 10(a) need not be effected by registered mail.

In determining whether to enforce a child support order entered in a German court against a resident of the United States, a North Carolina court considered the sufficiency of service by registered mail upon the American defendant. Stating that the United States has not objected to service by postal channels under article 10(a) of the Convention, the court held that such service was proper.[335]

4. *Additional Signatories to Hague Service Convention*

There were no new signatories to the Hague Convention in 1999.

C. Developments under the Inter-American Convention

In *Tucker v. Interarms*,[336] the plaintiff attempted to serve a party in Brazil via certified mail. Both the United States and Brazil are signatories to the Inter-American Convention on Letters Rogatory[337] and the Additional Protocol to the Convention,[338] which provide for service through letters rogatory forwarded to a central authority. The Ohio district court made reference to the Fifth Circuit's holding in *Kreimerman v. Casa Veerkamp S.A. de C.V.*,[339] that the Convention does not establish the exclusive means for effecting service. Nevertheless, the court determined there was no need to decide whether to adopt the same position because Brazilian domestic law also requires that service of process from abroad be obtained through a letter rogatory.

330. *Id.* at 571.

331. Randolph v. Hendry, 50 F. Supp. 2d 572 (S.D. W. Va. 1999).

332. Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986).

333. *Randolph*, 50 F. Supp. 2d at 577; *see also WAWA, Inc.*, 1999 WL 557936.

334. *Id.* at 578.

335. Anson/Richmond Child Support Enforcement Agency ex rel., Desselberg v. Peele, 523 S.E. 2d 125 (N.C. App. 1999).

336. Tucker v. Interarms, 186 F.R.D. 450 (N.D. Ohio 1999).

337. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, 14 I.L.M. 339 (entered into force Jan. 16, 1976).

338. Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 I.L.M. 1238 (entered into force June 14, 1980).

339. Kreimerman v. Casa Veerkamp S.A. de C.V., 22 F.3d 634 (5th Cir. 1994), *cert. denied*, 513 U.S. 1016 (1994).

There were no new signatories to the Inter-American Convention or the Additional Protocol to the Convention in 1999.

IX. Enforcement of Foreign Judgments

The recognition and enforcement by U.S. courts of foreign arbitration awards are governed by the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[340] The recognition and enforcement by U.S. courts of foreign court judgments are governed by the principles of comity as set forth in *Hilton v. Guyot*.[341] Although no federal statute or treaty covers the enforcement of foreign court judgments, many states have adopted the Uniform Foreign Money Judgments Recognition Act, which codifies the principles set forth in *Hilton*.[342]

As reported last year, a Special Commission of the Hague Conference on Private International Law is preparing a draft Convention on international jurisdiction and the effects of foreign judgments. This Special Commission conducted the second in a series of four meetings at The Hague during March 3–13, 1998.[343] On June 18, 1999, the Special Commission provisionally adopted a preliminary draft Convention.[344] The Special Commission revised the draft Convention at a meeting held at The Hague during October 1999.[345] A diplomatic conference to prepare the final text of the Convention is planned for the latter part of 2000.[346]

A. Cases Concerning the Recognition of Foreign Arbitral Awards

Chromalloy Aeroservices v. Arab Republic of Egypt[347] and *Arab Republic of Egypt v. Chromalloy Aero Services Co.*[348] received a great deal of attention for having confirmed an Egyptian arbitral award despite the annulment of the award by the Egyptian Court of Appeals. In *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*,[349] the Court of Appeals for the Second Circuit distinguished *Chromalloy* in refusing to enforce Nigerian arbitration awards that

340. United Nations Convention on the Recognition and Enforcement of Foreign Arbital Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *implemented by* 9 U.S.C. §§ 201–208 [hereinafter Convention].

341. Hilton v. Guyot, 159 U.S. 113 (1895).

342. *See generally* Christopher Givson, *International Litigation*, 31 Int'l Law. 347 (1997) (discussing the recognition of foreign judgments by U.S. courts).

343. *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 9, at p. 11 (1999), *available at* <http://www.hcch.net/e/workprog/jdgm.html>. The first meeting took place at The Hague in June 1997, which is reported in *Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, Prel. Doc. No. 8 (November 1997), *available at* <http://www.hcch.net/e/workprog/jdgm.html>.

344. The status of the work being performed by the Special Commission of the Hague Conference on Private International Law can be found at <http://www.hcch.net/e/workprog/jdgm.html>. The *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, adopted by the Special Commission on October 30, 1999 can be found at <http://www.hcch.net/e/conventions/draft36e.html>.

345. *See* <http:/www.hcch.net/e/workprog/jdgm.html>.

346. *See id.*

347. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996).

348. Arab Republic of Egypt v. Chromalloy Aero Services Co., General Register No. 95/23029, Paris App., 1st Chamber, Sect. C, *reprinted in* 12 No. 4 Mealey's Int'l Arb. Rep. 5.

349. Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194 (2d Cir. 1999).

were subsequently set aside by the Nigerian Federal High Court. *Baker Marine* involved disputes arising out of two contracts to provide barges for servicing Nigeria's oil industry.[350] Arbitrations were conducted in Nigeria pursuant to the contracts, and two arbitration panels issued monetary awards in favor of Baker Marine.[351] Baker Marine sought to enforce the awards in the Nigerian Federal High Court, and the losing parties sought to have the awards vacated by the same court.[352] The Nigerian Federal High Court set aside both awards.[353] Baker Marine then attempted to enforce the arbitral awards in the Northern District of New York under the Convention.[354] The district court declined to enforce the arbitral awards in view of the Nigerian court's decision to set aside the awards.[355]

In affirming the district court's decision, the Second Circuit distinguished *Chromalloy* by noting that Baker Marine was not a U.S. citizen and did not initially seek confirmation of the awards in the United States.[356] The court further emphasized that the *Chromalloy* parties had agreed not to appeal the results of the arbitration.[357] Hence, the Egyptian court's efforts to overturn the arbitral award resulted from a breach of the contractual obligation to abide by the arbitration results.[358] The Second Circuit held that in such circumstances, recognizing the Egyptian court's judgment nullifying the award would be "contrary to the United States policy favoring arbitration."[359]

B. Cases Concerning the Recognition of Foreign Court Judgments

A U.S. court may refuse to recognize the judgment of a foreign court that violates public policy. The decision of the Court of Appeals for the Fifth Circuit in *Southwest Livestock and Trucking Co. v. Ramón*,[360] however, illustrates the reluctance of courts to utilize this exception to the principles of comity.

In *Southwest Livestock*, the Fifth Circuit vacated a district court's refusal to recognize a Mexican court judgment awarding money damages in a contract dispute because the judgment was against Texas public policy regarding usury. In 1990, Southwest Livestock borrowed money from Ramón, a citizen of Mexico, and executed a promissory note in his favor requiring monthly payments with interest.[361] Each month Southwest Livestock executed a

350. *Id.* at 195.

351. *See id.* at 195–96. The contracts included provisions that disputes arising out of the contract would be settled conclusively by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). *See id.* at 195. The contracts specified that the arbitration procedure, to the extent not governed by the UNCITRAL rules, would be governed by the substantive laws of Nigeria and that the contracts would be interpreted in accordance with Nigerian laws. *See id.* The contracts also provided that a judgment based upon an arbitral award could be entered in any court having jurisdiction. *See id.* The contracts and awards under it were to be governed by the Convention. *See id.*

352. *Id.* at 196.

353. *Id.*

354. *See id.*

355. *Id.*

356. *Id.* at 197 n.3.

357. *Id.*

358. *See id.*

359. *Id.*; *see also* Spier v. Calzaturificio Tecnica, S.P.A, 71 F. Supp. 2d 279 (S.D.N.Y. 1999) (following the reasoning of *Baker Marine* in refusing to enforce a foreign arbitral award that had been nullified by three Italian courts considering the matter).

360. Southwest Livestock and Trucking Co. v. Ramón, 169 F.3d 317 (5th Cir. 1999).

361. *See id.* at 318.

new promissory note, but ultimately defaulted.[362] Ramón filed suit in Mexico based upon the last promissory note and obtained a judgment requiring Southwest Livestock to pay the debt, including interest at forty-eight percent.[363] Southwest Livestock appealed the Mexican court's decision, and the Mexican appellate court affirmed the judgment.[364]

Southwest Livestock then sued Ramón in federal district court in Texas and moved for partial summary judgment on the grounds that Ramón had violated Texas usury laws. Ramón also moved for summary judgment, seeking recognition of the Mexican judgment and dismissal of Southwest Livestock's suit under principles of collateral estoppel and res judicata.[365]

A magistrate judge to whom the motions were referred first determined that the district court was not required to recognize the Mexican court's judgment under the Texas Uniform Foreign Country Money Judgment Recognition Act because the judgment violated Texas public policy regarding usury.[366] The magistrate judge then concluded that Texas choice of law principles required application of Texas substantive law to Southwest Livestock's usury claim and recommended granting Southwest Livestock's summary judgment motion.[367] The district court adopted the magistrate judge's recommendations, and Ramón appealed.[368]

The Fifth Circuit applied Texas law because jurisdiction was based on diversity of citizenship.[369] The court observed that the Texas Recognition Act requires recognition of a foreign judgment absent one of ten grounds for nonrecognition.[370] One of those grounds is that "the cause of action on which the judgment is based is repugnant to the public policy of this state."[371] Southwest Livestock argued that the Mexican judgment fell within this public policy exception because the Texas Constitution prohibits interest rates above a specified level[372] and a Texas statute provides that usury is against Texas public policy.[373]

The Fifth Circuit noted that the refusal to recognize a foreign judgment on public policy grounds requires a substantial contravention of Texas public policy.[374] "The narrowness of the public policy exception reflects a compromise between two axioms—res judicata and fairness to litigants—that underlie our law of recognition of foreign country judgments."[375]

The Fifth Circuit then examined the language of the Texas Recognition Act and emphasized that the public policy exception refers expressly to the cause of action on which the judgment is based rather than to the judgment itself.[376] Based on this language, the

362. *See id.* Although none of the promissory notes other than the last one specified an interest rate, Ramón had charged Southwest Livestock interest of fifty-two percent. The last promissory note executed by Southwest Livestock contained a stated interest rate of forty-eight percent. *See id.* at 318–19.

363. *See id.* at 318.

364. *See id.*

365. *See id.* at 319.

366. *See id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 36.001 et seq. (West 1998) [hereinafter Texas Recognition Act]).

367. *See id.*

368. *See id.*

369. *Id.* at 320.

370. *Id.* (citing Texas Recognition Act § 36.005).

371. *Id.* (citing Texas Recognition Act § 35.005(b)(3)).

372. *See id.* (citing TEX. CONST. art. XVI, § 11).

373. *See id.* at 320–21 (citing CIV. STAT., art. 5069-1C.001) ("All contracts for usury are contrary to public policy").

374. *Id.* at 321 (citing Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 900 (N.D. Tex. 1980).

375. *Id.*

376. *Id.*

court determined that it is insufficient for the foreign judgment to contravene Texas public policy because the cause of action itself must be repugnant to Texas law.[377] The court therefore found it irrelevant "that the Mexican judgment itself contravened Texas's public policy against usury."[378] The Fifth Circuit concluded that the underlying cause of action for enforcement of a promissory note is not repugnant to Texas public policy.[379]

The Fifth Circuit distinguished *DeSantis v. Wackenhut Corp.*,[380] in which the Texas Supreme Court refused to apply Florida law to enforce a noncompetition agreement that was contrary to fundamental Texas public policy.[381] The court emphasized that *DeSantis* involved enforcement of an agreement under a foreign jurisdiction's law rather than recognition of a foreign court judgment.[382] The court noted that "[r]ecognition and enforcement of a judgment involve separate and distinct inquiries."[383] The Fifth Circuit reasoned that Ramón was attempting to use the Mexican judgment defensively against Southwest Livestock's usury lawsuit rather than offensively to collect the Mexican money judgment. "Different considerations apply when a party seeks recognition of a foreign judgment for defensive purposes."[384]

Foreign courts must comply with the requirement of due process for their judgments to be recognized by U.S. courts. In *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*,[385] a federal district court enforced a Romanian judgment, concluding that the Romanian judicial system under which the judgment was granted complied with the requirements of due process.

S.C. Chimexim, a Romanian corporation, and Velco, a U.S. corporation with a representative office in Romania, had entered into an agreement to settle a dispute over payments owed by Velco to Chimexim.[386] After Velco breached the agreement, S.C. Chimexim sued Velco to recover the money due under the agreement.[387] Velco failed to appear, and a Bucharest Tribunal entered a default judgment against it.[388] Velco appealed that judgment to the Bucharest Court of Appeal, arguing that the Tribunal's judgment should be reversed because, among other things, service of process had been inadequate, the Tribunal lacked personal jurisdiction over it, and the Tribunal had failed to investigate the merits of the case.[389] The court of appeal rejected each of Velco's arguments and affirmed the judgment

377. *Id.*

378. *Id.*

379. *Id.* The court also noted the importance of upholding contractual obligations agreed to by parties in good faith. Parties should be able to enter into a contract providing for interest rates permitted under the laws of the place of performance without fear of penalties under the usury laws of another state. *See id.* at 323 (citing Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407–08 (1927)).

380. DeSantis v. Wackenhut Corp., 793 S.W.2d 670 (Tex. 1990).

381. *See Southwest Livestock*, 169 F.3d at 322.

382. *Id.* The court also noted that the noncompetition agreement in *DeSantis* implicated stronger public policy considerations under Texas law than did a usurious contract. *See id.* (citing Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744 (5th Cir. 1981) (Texas bankruptcy court may apply Mississippi usury law to a transaction between a Texas partnership and Mississippi corporation without violating fundamental Texas policy).

383. *Id.*

384. *Id.* (citing Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 160 (1932) (Justice Brandeis commenting that "to refuse to give effect to a substantive defense under the applicable law of another state, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done")).

385. S.C. Chimexim S.A. v. Velco Enter. Ltd., 36 F. Supp. 2d 206 (S.D.N.Y. 1999).

386. *See id.* at 209.

387. *See id.*

388. *See id.* at 210.

389. *See id.*

of the Tribunal.[390] Velco then appealed to the Supreme Judicial Court of Romania, although neither party informed the U.S. court of the result of that appeal.[391] The Romanian courts did not stay execution of the judgment, and S.C. Chimexim initiated suit in U.S. federal district court to enforce the Romanian judgment.[392]

The district court reviewed the principles of comity as set forth in *Hilton v. Guyot*,[393] and the codification of those principles by the State of New York.[394] The district court enforced the judgment because it found that the Romanian judicial system comports with the requirements of due process required by New York law.[395] In making this finding, the district court considered evidence of Romanian judicial reform,[396] due process guarantees provided in the Romanian Constitution,[397] a Romanian law establishing the judiciary as an independent governmental branch,[398] expert testimony by Romanian attorneys on the due process provided under Romanian law,[399] and the existence of a trade relations treaty between the United States and Romania indicating the willingness of the United States to recognize Romania's judicial system.[400]

The district court concluded that S.C. Chimexim had established the Bucharest Tribunal's personal jurisdiction over Velco. The district court emphasized that Velco voluntarily appeared in the Bucharest proceedings by appealing the Tribunal's judgment to the Bucharest appellate court and contesting the judgment, at least in part, on the merits.[401] Participation by a party beyond that necessary to preserve an objection to the jurisdiction of the foreign court waives the party's right to claim an exception.[402] The district court also noted that Velco had acquired a corporate status in Romania and that the cause of action arose through business conducted by Velco through its Romanian office.[403]

A party challenging the fairness and impartiality of a foreign jurisdiction in a U.S. court need not have raised those challenges in the foreign court. In *Bridgeway Corp. v. Citibank*,[404] a district court declined to enforce a judgment rendered by a Liberian court. In 1982,

390. *See id.*

391. *See id.* The district court noted that neither party had informed it of the disposition, if any, of the appeal by the Supreme Judicial Court.

392. *See id.*

393. *Hilton*, 159 U.S. at 163–64.

394. Uniform Foreign Money-Judgments Recognition Act, N.Y.C.P.L.R. Art. 53 (Consol. 1999).

395. *S.C. Chimexim*, 36 F. Supp. 2d at 213.

396. *See id.*

397. *See id.* at 214.

398. *See id.* The court also noted the existence of tenure for at least some Romanian judges and the existence of three levels of appellate review.

399. *See id.*

400. *See id.*

401. *Id.* at 215.

402. *See id.*

403. *Id.* Velco also contended that the district court should refuse to recognize the Romanian judgment because the Romanian courts lacked subject matter jurisdiction, the judgment was contrary to the agreement between the parties, and Velco received inadequate notice that deprived it of the opportunity to defend. *See id.* The district court rejected each of these contentions, noting that Velco failed to provide evidence that the Romanian courts lacked subject matter jurisdiction and that the agreement did not have any provision barring Chimexim from bringing suit. *Id.* The district court further stated that Velco had defended itself against the Tribunal's judgment on appeal and that the Romanian Court of Appeal had considered and rejected Velco's argument regarding notice. *Id.* at 216.

404. Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276 (S.D.N.Y. 1999), *aff'd*, 201 F.3d 154 (2d Cir. 2000).

Bridgeway, a Liberian corporation, deposited funds in U.S. dollars in an account at Citibank Liberia.[405] Citibank, a U.S. corporation licensed to engage in banking in Liberia, elected to close its banking operations in 1991 due to an ongoing civil war in Liberia. In view of Citibank's decision to cease banking operations, Bridgeway demanded repayment of its funds in U.S. dollars. Citibank refused to pay funds in U.S. dollars; rather, it remitted funds in Liberian dollars to the National Bank as part of its liquidation plan.[406] Bridgeway then brought suit in Liberia seeking repayment of deposit in U.S. dollars. The trial court decided in favor of Citibank, holding that Liberian banking laws permitted Citibank to return deposits in U.S. or Liberian dollars at Citibank's option.[407] Bridgeway appealed to the Supreme Court of Liberia, which reversed the trial court's decision and entered judgment for Bridgeway.[408] Bridgeway then initiated suit in New York State Supreme Court to enforce the Liberian judgment. Citibank removed the action to federal district court.[409]

Bridgeway argued that Citibank was judicially estopped from asserting the unenforceability of the Liberian judgment because it had voluntarily participated in the Liberian litigation and never contested the impartiality of the Liberian courts.[410] The district court, however, concluded that Citibank was not estopped.[411] The district court found that because Citibank had not raised the issue of the fairness of the Liberian judicial system in the earlier proceeding, it was not taking an inconsistent position in the current case by raising that issue.[412]

The district court then concluded that the Liberian judicial system was not fair and impartial and that it failed to comport with the requirements of due process when the Liberian court issued the judgment.[413] The district court further found that, because of the Liberian civil war and the suspension of the 1986 Liberian constitution, judges had served at the will of the warring factions and were subject to political and social influence.[414] The district court rejected expert testimony submitted by Bridgeway that the procedural rules of Liberia's court system were modeled after the procedures for the New York State courts and that the government of Liberia was patterned after U.S. state governments. The district court concluded that evidence that the Liberian judicial system was modeled after systems in the United States did not mean that Liberia had administered its judicial system in a manner consistent with U.S. judicial procedures.[415]

405. *See id.* at 280–81.

406. *See id.* at 281.

407. *See id.*

408. *See id.*

409. *See id.* at 282.

410. *See id.* at 283.

411. *Id.* at 283–84.

412. *Id.* at 284. The district court further commented that "as a policy matter, parties in foreign proceedings should not be required to explicitly assert the position that the particular forum in which they are litigating is unfair . . . to preserve their right to challenge the enforceability of the judgment rendered by that tribunal in a subsequent proceeding. Indeed, the very reason statutes such as CPLR Art. 53 exist is so that parties who believe that they have not been treated fairly in foreign courts have an avenue of redress in courts in the United States." *Id.*

413. *Id.* at 287.

414. *Id.*

415. *Id.* The district court relied in part on Department of State Country Reports in arriving at its conclusions regarding the state of Liberia's judicial system. *Id.* at 280. On appeal, the Second Circuit disagreed with Bridgeway's argument that these Country Reports were excludable hearsay. The Second Circuit found that the reports were admissible under Fed. R. Evid. 803(8)(C), which allows the admission of factual findings based on investigations authorized by law. *Id.* at 143.